82-1479

Office-Supreme Court, U.S.
FILED
MAR 4 1983
ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT
OF THE UNITED STATES

THE JUSTICES OF THE
BOSTON MUNICIPAL COURT,
Petitioners,

V.

MICHAEL LYDON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I. Whether a federal court may grant habeas corpus relief to an individual free on personal recognizance prior to a trial *de novo*?

II. Whether a federal court may sit as a court of appellate review to determine the sufficiency of evidence adduced at a bench trial where the state provides for a trial *de novo* as the sole remedy for anyone dissatisfied with the result of a bench trial which a defendant has chosen voluntarily in the first instance?

III. Whether *Burks* v. *United States*, 437 U.S. 1 (1978), has application to the trial *de novo* system?

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PETITION FOR WRIT OF CERTIORARI
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OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, Lydon v. Justices of the Boston Municipal Court, No. 82-1376 is not yet reported. (App. A). The opinion of the district court is reported at 536 F.Supp. 647 (D. Mass. 1982). (App. B). The decision of the Supreme Judicial Court, Lydon v. Commonwealth, is reported at Mass. Adv. Sh. (1980) 1915, 409 N.E.2d 745 (1980). (App. C).

JURISDICTION

The decision below issued on December 30, 1982. A motion to stay issuance of the mandate pending the filing of a petition for writ of certiorari was allowed until March 21, 1983. The jurisdiction of this court is claimed under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

Fifth Amendment

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. ..."

STATEMENT OF THE CASE

Michael Lydon was charged with possession of burglarious implements and breaking and entering a motor vehicle with the intent to commit a misdemeanor. Although he had a right to a jury trial in the first instance, he elected a

bench trial, preserving his right to a subsequent jury trial if dissatisfied with the results of the bench trial.[1/]

At the close of evidence at the bench trial, counsel for Lydon argued that the Commonwealth had failed to introduce sufficient evidence on an element of the crime. A guilty verdict was entered. Lydon then claimed his right to trial by a jury of six. Prior to the jury trial, he moved to dismiss the complaint, alleging that the evidence at the bench trial was insufficient to support conviction. The motion was denied.

Lydon then sought extraordinary relief pursuant to Mass. Gen. Laws c. 211, §3. The jury trial was stayed and two questions were reported to the Full

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1/ Mass. Gen. Laws c. 218, §§26, 26A.

Bench.[2/] The majority of the Supreme Judicial Court found the double jeopardy claim to be without merit and further found that a jury trial judge would have no occasion to consider the sufficiency of the evidence at the bench trial. Lydon v. Commonwealth, 409 N.E.2d 745 (1980).

Lydon filed a petition for writ of

2/ 1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him without waiving his rights, when the evidence at bench trial was insufficient to warrant a conviction?

2. Assuming that a jury trial in such an instance would be denial of defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial had denied an appropriate request for a ruling that the evidence at the bench trial was sufficient."

certiorari which was denied. 449 U.S. 1065 (1980).

A petition for writ of habeas corpus was then filed in the District Court for the District of Massachusetts. The respondents below moved to dismiss on the grounds that the Court lacked jurisdiction and that the petition failed to state a claim upon which relief could be granted. The court denied respondents' motion to dismiss and ordered that the petition be granted, that the petitioner be released from personal recognizance and that he not be retried. (App. B). The order of the district court was stayed pending appeal.

The Court of Appeals affirmed the judgment and granted the following relief:

> "The appropriate relief is simply issuance of the writ providing Lydon his freedom from being

> required to answer any summons to a second trial. We have no reason to believe the Commonwealth will seek to retry him unless the decision is reversed. Lydon v. The Justices of the Boston Municipal Court, Slip Opinion at 25 (No. 82-1376). (App. A).

REASONS FOR GRANTING THE WRIT

I. The decision below which is neither constitutionally nor logically compelled, conflicts with the tenor of decisions of this and other lower federal courts concerning the jurisdiction of federal courts in habeas corpus actions and the scope of relief which may be granted.

II. The decision below constitutes an unwarranted and constitutionally unnecessary extension of Burks v. United States, 437 U.S. 1 (1978).

III. The decision below creates an entirely new class of cases cognizable on federal habeas corpus review.

ARGUMENT

I. THE COURT BELOW HAS ERRED IN GRANTING PRE-TRIAL HABEAS CORPUS RELIEF TO A DEFENDANT IN A STATE CRIMINAL PROCEEDING.

INTRODUCTION

The Massachusetts Trial De Novo System

Under the Court Reorganization Act of 1978, a defendant, charged with a crime over which the Boston Municipal Court and the district courts of the Commonwealth have original jurisdiction, has a right to be tried by a jury in the first instance or he may elect an initial bench trial.[3/] If the defendant elects a bench trial, he must file a written waiver of the jury trial.[4/]

3/ Mass. Gen. Laws c. 218, §26A.

4/ Id. The waiver will be received only if a defendant is represented by counsel or has filed a written waiver of counsel.

If a bench trial is chosen, and a defendant is dissatisfied with the outcome, his sole remedy is a trial de novo, before either a judge or jury at his election with appellate review after conviction based upon the record of the de novo trial.[5/] With the claim of the de novo trial, the judgment at the bench trial is "wiped out." Mann v. Commonwealth, 359 Mass. 661 (1971). If a jury trial is chosen in the first instance, appellate review is available following conviction.[6/]

The two-tier system is not unique to Massachusetts, but, as is acknowledged by the First Circuit, has been enacted in similar form in several of the states. Therefore, the decision of the

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5/ Mass. Gen. Laws c. 218, §§26 and 27A; c. 278, §18.

6/ Mass. Gen. Laws c. 218, §27(g).

Court of Appeals permitting review, in a federal court, of the sufficiency of the evidence adduced at a bench trial, prior to a de novo trial which a defendant has chosen and if it determines the evidence to be insufficient, barring the de novo trial on double jeopardy grounds affects not only Massachusetts.

A. Respondent Is Not "In Custody" For Habeas Corpus Purposes.

Lydon alleged federal jurisdiction pursuant to 28 U.S.C. §2241 and §2254.

Section 2254 pertains only to a state prisoner in custody pursuant to a judgment of conviction of a state court. Lydon is not in custody pursuant to a "judgment of conviction" of a state court. That judgement was "wiped out" with his claim of a trial de novo. Mann v. Commonwealth, 359 Mass. 661, 667 (1971). See also Costarelli v.

Massachusetts, 421 U.S. 193, 194 (1978). The only restraint on Lydon is a personal recognizance pending his de novo trial. It is submitted that personal recognizance does not satisfy the custody requirement of §2241 and that even were the court possessed of jurisdiction, it should not have exercised it.

The court below determined that the custody requirement was met under Hensley v. Municipal Court, 411 U.S. 345 (1973). Hensley is distinguishable. In Hensley this court held that a person who was convicted and sentenced at a state court trial, but who was enlarged on his own recognizance pending execution of sentence was in sufficient custody to confer jurisdiction on the federal court.

The significant different here is that Lydon is not on recognizance

following either conviction or sentence; unlike Hensley, any future incarceration is a "speculative possibility that depends on a number of contingences..." Hensley at 352. Moreover, the finding of custody here does interfere with a "significant interest" of the Commonwealth - its ability to administer the two-tier system in an orderly fashion. To permit federal intervention is to create yet a third and fourth federal tier and cause substantial delay in the trial of relatively minor offenses.

Personal recognizance under these circumstances does not constitute a "severe" restraint on an individual's liberty - it is a restraint no greater than that imposed on a witness under subpoena. To hold that such an individual is "in custody" is to truly

open the doors of the federal court to all persons prior to trial. It is submitted that the court below has improperly extended Hensley from a post-trial setting to a pre-trial situation.

Moreover, it is only 28 U.S.C. §2254(e), not §2241, which specifically provides for review of the sufficiency of the evidence, once the jurisdictional prerequisite of "custody pursuant to the judgment of a state court" is met. It is therefore submitted that the court lacked jurisdiction to rule on the claim of insufficient evidence.

Assuming arguendo that the jurisdictional requirement has been met, it is submitted that the court below has violated principles of comity and federalism in granting pre-trial relief.

First, the threshold issue decided by the federal court was whether

sufficient evidence was introduced at the bench trial to support conviction - no state court has ever ruled on this claim. Relief from a conviction in which such an error or any other error of law has allegedly occurred is had in Massachusetts by a trial de novo. Therefore, Lydon has not sufficiently exhausted his state court remedies.

Second, the pre-trial relief afforded, effectively aborting the de novo trial, runs contrary to decisions of this and lower federal courts. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973) is the leading case on the propriety of a pre-trial grant of relief. In Braden the court granted relief to a petitioner seeking to require the state to grant him a prompt trial. The court emphasized that the relief requested

would not "abort a state proceeding or ... disrupt the orderly functioning of the state judicial processes." Id. at 491. The result reached by the First Circuit has done just that, contrary to the admonition in Braden,

> "[w]e emphasize that nothing we have said would permit the derailment of a pending state proceeding by an attempt to litigate constitutional defenses prematurely in federal court." Id.

Here, the double jeopardy defense is indeed premature because prior to a ruling by the federal district court on the sufficiency of evidence there exists no colorable double jeopardy claim. If the defendant challenges the evidentiary sufficiency of the prosecution's case he need but go forward with the trial de novo and put the prosecution to the test. The federal court should abstain

where the issue may be resolved by trial on the merits. See gen. Atkins v. People of State of Michigan, 644 F.2d 543 (6th Cir. 1981); Neville v. Cavanaugh, 611 F.2d 673 (7th Cir. 1981). Moreover, no extraordinary circumstances justifying pre-trial relief have been presented. See Braden at 508 (Rehnquist, J. dissenting); Moore v. DeYoung, 515 F.2d 437 (3rd Cir. 1975).7/

Therefore, it is submitted that even if the court had jurisdiction, the grant of relief was premature and violated principles of comity and federalism.

7/ Although, a number of lower federal courts have indicated that a double jeopardy claim does constitute an extraordinary circumstance justifying pre-trial habeas consideration, the instant case presents nothing more than a denial of a motion for a directed verdict of acquittal.

B. The Court's Assumption Of Jurisdiction To Review A Sufficiency Of The Evidence Claim Prior To A De Novo Trial Is In Conflict With Decisions Of Other Circuit Courts of Appeal.

The Fourth, Fifth and Ninth Circuits, in analogous circumstances, have denied federal defendants appellate review of "evidence insufficiency" claims prior to federal retrial. United States v. Ellis, 646 F.2d 132 (4th Cir. 1981); United States v. Rey, 641 F.2d 222 (5th Cir.), cert. denied, 102 S.Ct. 318 (1981); United States v. Becton, 632 F.2d 1294 (5th Cir. 1980), cert. denied, 102 S.Ct. 141 (1981); United States v. Carnes, 618 F.2d 68 (9th Cir.), cert. denied, 100 S.Ct. 3028 (1980). But see United States v. McQuilkin, 673 F.2d 681 (3rd Cir. 1982).

In each case the circuit courts have refused to permit interlocutory review

of a sufficiency of the evidence claim, even though, as here, an attempt was made to characterize the issue as one of double jeopardy. In each case the courts viewed the decision in Abney v. United States, 431 U.S. 651 (1977), as limited to colorable and perfected claims of double jeopardy.

Moreover, Abney concerned the construction of the term "final decision" under 28 U.S.C. §1291 and held that an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds was permitted. The decision was concerned solely with federal appellate jurisdiction. It did not involve a jurisdictional issue in which the "potential conflict between courts of two different governments," (Radio Station WOW v. Johnson, 326 U.S. 120,

124 (1945)), necessarily implicates those principles of comity and federalism which dictate restraint from precipitous federal involvement in state criminal proceedings. It is submitted that Abney, addressing the final judgment rule within a unitary system, has no affect on the jurisdictional requirements of §2254 or §2241(c)(3) concerning state prisoners.

A contrary decision, however, was reached in Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981). The Sixth Circuit found jurisdiction to permit issuance of the writ stating,

> "when a state reviewing court specifically finds the evidence sufficient to support a conviction but reverses on other grounds and orders a new trial, the defendant may seek to prevent retrial on double jeopardy grounds by bringing a federal habeas corpus proceeding after state

remedies have been exhausted." Delk v. Atkinson, supra at 93.

In the instant case, however, no state reviewing court has reviewed the sufficiency of the evidence, nor is the state constitutionally required to provide such review. Griffin v. Illinois, 351 U.S. 12, 18 (1956). Therefore, the double jeopardy claim is not ripe for review in a federal habeas corpus case. Moreover, the instant case did not present to the federal court a double jeopardy question, the claim is simply one of a denial of a motion for directed verdict. The federal court here first assumed jurisdiction to review the sufficiency of evidence at a bench trial and only after that determination was made did any colorable claim of double jeopardy arise.

C. The Relief Granted Conflicts With The Fifth And Seventh Circuits' View of The Proper Scope Of Habeas Relief.

The relief granted by the court below, release from personal recogniance and an expressed expectation that the Commonwealth would not attempt to provide Lydon with the trial de novo he claimed, conflicts with the Fifth and Seventh Circuits as to the proper scope of relief to be accorded a habeas application.

As the Fifth Circuit has noted, the practical effect of such an order is to enjoin the Commonwealth from trying the defendant.[8/] Kolski v. Walton, 544 F.2d 762, 763-764, n.2 (5th Cir. 1977).

In both Kolski and Stevens v. Circuit Court of Milwaukee County, 675

8/ The court attempted to avoid the Justices' contention that the District Court had improperly enjoined the trial de novo. Lydon, Slip Opinion at 25.

F.2d 946 (7th Cir.), the circuit courts recognized that the principles of judicial restraint premised upon the doctrines of comity and federalism as enunciated in Younger v. Harris, 401 U.S. 37 (1971), require that a federal court not interfere in a pending state criminal proceeding whether the claim for relief be by habeas corpus or by either injunction or declaratory relief, in the absence of extraordinary circumstances. In neither the district nor appellate court did Lydon meet the burden of demonstrating extraordinary circumstances, nor did the courts require him to do so.

It is submitted therefore that the principles of federalism and comity underlying Younger are applicable to this habeas proceeding and the petitioner has failed to satisfy the

abstension hurdles established by that case.

II. THERE IS NO CONSTITUTIONAL BASIS FOR EXTENDING BURKS V. UNITED STATES, 437 U.S. 1 (1978) TO THE TRIAL DE NOVO SYSTEM.

A. Burks Is Limited In Its Application.

The precise holding in Burks v. United States, 437 U.S. 1 (1978) is that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." Burks at 18. In each case following Burks, this court has reiterated that the Burks exception to permitting retrial after reversal is triggered by an appellate decision that the evidence at trial was insufficient. Bullington v. Missouri, 451 U.S. 430, 442, 443 (1981); Tibbs v. Florida, ___ U.S. ___, 102 S.Ct. 2211 (1982).

It seems quite clear from decisions of this court that Burks has application

only where a court having jurisdiction to review the sufficiency of the evidence, finds that as a matter of law the evidence was insufficient to support a conviction. Under these circumstances, retrial is forbidden. See Hudson v. Louisiana, 450 U.S. 40, 45, n.5 (1981). Contrary, to the decision of the First Circuit, the Fourth, Fifth, Sixth and Ninth Circuits[9/] have deemed a prior decision by an appellate court as critical to the application of Burks.

It is submitted that the First Circuit's finding that review of a sufficiency of evidence claim, in the first instance, by a federal district court by way of a habeas corpus petition

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9/ United States v. Ellis, 646 F.2d 132 (4th Cir. 1981); United States v. Becton, 632 F.2d 1294 (5th Cir. 1980); Delk v. Atkinson, supra; United States v. Carnes, 618 F.2d 68 (9th Cir. 1980).

satisfies the Burks requirement is unsupported.

Reliance on Jackson v. Virginia, 443 U.S. 307 (1979) is misplaced. Jackson sought habeas corpus relief pursuant to 28 U.S.C. §2254, after a state Supreme Court had denied on the merits a petition for writ of error on the ground that the evidence was insufficient to support conviction. This court found that Congress had specifically provided for review of the issue in a federal court under §2254. Jackson did not deal with the scope of jurisdiction under §2241. The rationale for the duty of the federal court to provide such review is stated as:

> "The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur - reflecting as it does the belief that the 'finality' of a deprivation of liberty through the invocation

> of the criminal sanction is simply not to be achieved at the expense of a constitutional right - is not one that can be so lightly adjured." Jackson at 323.

There is no finality, in general, attendant to a determination of guilt at a bench trial and in this specific case the judgment was "wiped out" when Lydon voluntarily chose a de novo trial. Moreover, Lydon, unlike Jackson, has not satisfied the settled procedural prerequisites for his claim under §2254. Therefore it is submitted, he is not entitled to habeas corpus relief under Jackson.

Furthermore, it is basic that a federal district court does not sit as a court of appellate review over state criminal trials. This court in Jackson did not extend habeas corpus jurisdiction, it simply announced a

standard of review applicable once jurisdictional prerequisites under §2254 had been met. Jackson does not provide a basis for extending Burks to the trial de novo system.

B. The Double Jeopardy Clause Is Not Offended By Operation Of The Trial De Novo System.

The Double Jeopardy Clause is designed to protect against,

> "... permitting the sovereign freely to subject the citizen to a second trial for the second offense would arm government with a potential instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977).

The Massachusetts trial de novo system, as has been noted, is entirely voluntary. The prosecution does not have any authority to force a defendant to undergo two trials. The right to a jury trial is not conditioned on first undergoing a bench trial. The system

does not permit retrial after acquittal. The defendant may elect to receive an initial jury trial with appellate review or he may choose a bench trial with the option of a second chance to be acquitted on the facts. He is deemed to have waived any review of the bench trial except a de novo trial.[10/] This system does not constitute the type of governmental oppression the double jeopardy clause is designed to protect against.

The decision below needlessly affects the ability of the state to

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10/ The First Circuit viewed this "waiver" to be subject to the waiver standard of Johnson v. Zerbst, 304 U.S. 458, 464 (1938), i.e. "an intentional relinquishment of a known right or privilege." However, that standard applies only to waiver of fundamental constitutional rights. No such right is involved herein. The defendant waives only his right to appellate review - to which he has no constitutional right. Griffin v. Illinois, 351 U.S. 12 (1956).

experiment in the area of criminal trial procedure and to provide practical advantages to defendants, without any indication that the trial de novo system operates in a manner which is arbitrary, capricious or unreasonable. See gen. New York State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1972) (Brandeis, J.).

The decision not only constitutes an injustice to the Commonwealth, but places an unnecessary burden upon the federal district courts by requiring them to sit as a court of appellate review in the first instance in every case in which insufficiency of evidence is alleged by a defendant convicted at a bench trial in the Commonwealth of Massachusetts. Such a result disrupts the orderly administration of justice in the already overburdened federal system and causes significant delay in the two-tier system where those convicted in

the bench trial may now avail themselves of yet a third federally created tier. Such a procedure offends all notions of comity and federalism and creates an entirely new class of cases susceptible to habeas review.[11/]

CONCLUSION

For the reasons stated above the writ of certiorari should issue to review the decision of Court of Appeals for the First Circuit.

Respectfully submitted,

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11/ Now pending in the District Court are the following: Tinder v. Sister Rose Paula, No. 80-2127-T; Montanez v. Justices of the Boston Municipal Court, No. 82-1965-N; Murchinson v. Justices of the Boston Municipal Court, No. 83-444-S.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1376

MICHAEL LYDON,
Plaintiff, Appellee,

V.

JUSTICES OF THE BOSTON
MUNICIPAL COURT
Defendants, Appellants.

APPEAL FROM THE UNITED STATES
DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. W. Arthur Garrity, Jr.,
U.S. District Judge]

[536 F.Supp. 647 D. Mass. (1982)]

Before

Davis*, Campbell and Breyer,

Circuit Judges.

December 30, 1982

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*Of the Federal Circuit, sitting by designation.

BREYER, Circuit Judge. The habeas corpus petitioner in this case was convicted of a state crime by a Massachusetts judge under the Massachusetts "two-tier" criminal trial procedure. As in his right under that procedure, the petitioner then chose to have a completely new trial by jury. He argued, however, to the new trial court, to the Massachusetts Supreme Judicial Court, and then to the federal district court, that he must be released, rather than undergo a new trial, because his bench trial conviction rested on insufficient evidence and any new trial would therefore place him in double jeopardy. In violation of the Fifth Amendment to the United States Constitution.

The federal district court reviewed the trial record and found that the evidence at the bench trial was

constitutionally insufficient for conviction. The court further found that the state had not obtained defendant's informed consent to run a risk of double jeopardy harm, though it was not (nor in the future would it be) difficult for the state to seek such informed consent from criminal defendants. It held that a second trial was therefore barred by the Double Jeopardy Clause. Lydon v. Justices of Boston Municipal Court, 536 F.Supp. 647 (D. Mass. 1982). We agree with the district court and affirm its decision.

I

The Massachusetts two-tier system, like others in nearly half the states, allows a defendant to choose either the standard route of a jury trial with appellate review, or the two-tier

route. See Comment, Double Jeopardy Problems Presented by Two-Tier Systems, 69 Geo. L.J. 1525, 1527 (1981). If he chooses the latter alternative, he first receives a bench trial. If he is convicted, he then has an absolute right to choose a second trial to take place de novo, either before a jury, or (if the defendant waives the jury) before another judge. Mass. Gen. Laws ch. 218, §§ 26, 26A, 27A. The original system did not permit the initial choice--all defendants went through both tiers of the system. See Ludwig v. Massachusetts, 427 U.S. 618 (1976). The present system is the product of the Court Reorganization Act, Chapter 478 of the Act of 1978, see Note, Double Jeopardy and the De Novo System, 16 New England L. Rev. 303, 308-09 (1981), following recommendations made by the

Governor's Select Committee on Judicial Needs (the "Cox Committee") in 1976.

Prior to 1978, it would have been difficult to see how, from a constitutional perspective, this system could work to a defendant's disadvantage. For one thing, he is free to disregard the system by choosing an initial trial by jury. For another, if he chooses the two-tier alternative, he is entitled to a totally new trial on request. It is as if the state automatically accepts any complaint a defendant may have about his first trial; a new trial is always granted. See Ludwig v. Massachusetts, 427 U.S. at 651. At the same time, the system saves both the state and the defendant time and expense, because many defendants, presumably after seeing the evidence against them, do not seek the automatic

new trial to which they have a right. Thus, the Massachusetts Supreme Judicial Court wrote that only about 9 percent of the criminal defendants in Boston chose a jury trial in the first instance, and "thousands of complaints were finally disposed of by convictions at bench trials because the affected defendants did not seek a jury trial." Lydon v. Commonwealth, 1980 Mass. Adv. Sh. 1915, 1918 n.5, 409 N.E.2d 745, 748 n.5 (1980).

In 1977 and 1978, however, the Supreme Court broadened the scope of defendant's double jeopardy protection in a way perhaps not foreseen by the Massachusetts system's reformers. In Burks v. United States, 437 U.S. 1 (1978), the Court overturned a prior line of cases and held that once "a reviewing court has determined that in a prior trial the evidence was

insufficient to sustain the verdict of the jury," the Double Jeopardy Clause forbids a retrial. 437 U.S. at 5 (record review made by a federal appellate court); accord, Hudson v. Louisiana, 450 U.S. 40 (1981) (record review made by a state trial court). Then in Jackson v. Virginia, 443 U.S. 307 (1979), the Supreme Court held that a federal habeas court must look to see whether a state conviction rests upon enough evidence to convince a rational trier of fact to find guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970) (a conviction failing to meet that standard violates the Fourteenth Amendment "due process" clause). Petitioner believes that, under Jackson, the federal habeas court here properly determined that the evidence at the first trial was

constitutionally insufficient and, hence, under Burke, he cannot be retried--he is entitled to unconditional release from custody.

Before evaluating petitioner's argument, we shall describe the procedural context in which this case arises. The petitioner, Lydon, was charged with possessing implements designed to break open a "depository" (here, an automobile) in order to steal money or property from it. He chose to participate in the two-tier system. He was convicted at the first tier. The trial judge rejected his claim that the prosecution had not presented evidence of one key element of the offense charged, namely, an intent to steal money or property from the car.

Lydon asked for a trial de novo by a jury. He then asked the jury-trial

judge to dismiss the charges on double jeopardy grounds. The motion was denied. A single justice of the Massachusetts Supreme Judicial Court, however, stayed the second trial and heard Lydon's claim. The justice was willing to assume the evidence was inadequate, and, on that assumption, asked the full court in the exercise of its "superintendence powers," Mass. Gen. Laws ch. 211, § 3, to answer two questions:

> 1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, . . . when the evidence at the bench trial was insufficient to warrant a conviction?
>
> 2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level . . .?

Lydon v. Commonwealth, 1980 Mass. Adv. Sh. at 1916 n.3, 409 N.E.2d at 747 n.3.

The Supreme Judicial Court answered the first of these questions in the negative. It reasoned, first, that the initial trial judge had held that the evidence against Lydon was sufficient; since the state system did not provide for any review of that holding, no double jeopardy claim could arise. Second, regardless of whether the evidence was sufficient, there was no consitutional injury. Lydon chose to enter a system where a new trial would be his for the asking; in return, he must accept the fact that his only remedy would be a new trial. The Double Jeopardy Clause protects against governmental oppression, here, there was no such oppression because Lydon had volunteered to participate in the

two-tier system.

The Supreme Judicial Court went on to answer the second question affirmatively, but added that its answer was "largely academic." Since Lydon had no double jeopardy right, the second trial court would not pass upon the adequacy of the evidence at the first trial.

Lydon sought certiorari, which was denied, and then sought habeas corpus. The federal district court, in the habeas proceeding, reviewed the original trial transcript and found the evidence to be constitutionally insufficient. The district court concluded that retrial was barred by the Double Jeopardy Clause. It ordered Lydon released and prohibited his retrial.

The Commonwealth has appealed. It obtained a stay of the district court's

order pending this appeal. The Commonwealth has stated it will not retry the petitioner until the appeal is decided. Lydon is currently released on "personal recognizance."

II

We must first decide whether the district court had authority to review the record of Lydon's bench trial to determine whether the evidence was sufficient for conviction. Otherwise, the district court, faced with an authoritative state court finding that the evidence was insufficient, would have seen no double jeopardy problem. We believe that the district court had this authority.

1. Contrary to the Commonwealth's contention, Lydon met the technical "custody" requirements of the two habeas

corpus statutes relevant here, 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 2254. The first of these statutes authorizes the writ to be issued on behalf of "a prisoner . . . in custody in violation of the Constitution . . . of the United States . . . ." The second authorizes its issuance on behalf of "a person in custody pursuant to the judgment of a state court" on the ground, (among others) "that he is in custody in violation of the Constitution . . . ."

It is now well established that release on personal recognizance is "custody" within the meaning of both of these corpus statutes. Hensley v. Municipal Court, 411 U.S. 345 (1973). Personal recognizance subjects an individual to restaints "not shared by the public generally," for "state judicial officers may demand his

presence at any time," and "[d]isobedience is itself a criminal offense." 411 U.S. at 351. In this instance, if Lydon failed to appear for his jury trial, his original sentence could be reimposed. Mass. Gen. Laws ch. 278, § 54. Moreover, although the state characterizes Lydon's choice of a new trial as a choice that "wipes out" the first court's judgment, the fact is that Lydon is under special restraint because he was found guilty at the bench trial; otherwise, he would have been released. Lydon is essentially in the same position as the defendant in Hensley, who "remained at large under an order of the state court staying execution of his sentence." 411 U.S. at 347. We therefore believe that Lydon is in "custody" under the less restrictive language of § 2241(c)(3) and also under

the more restrictive language of § 2254, which requires that the custody be "pursuant to the judgment of a state court." Cf. Thames v. Justices of the Superior Court, 383 F. Supp. 41, 43 (D. Mass. 1974) (release on bail after a mistrial is "custody" under both § 2254 and § 2241).

2. Once the technical custody problems are met, at least as a general matter, a habeas court can review a petitioner's claim that a state court conviction rests upon insufficient evidence. Jackson v. Virginia, supra. The constitutional basis for such review arises from the fact that if, "after viewing the evidence in the light most favorable to the prosecution," no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the state

conviction violates the Fourteenth Amendment's "due process" requirements. 443 U.S. at 219. See Johnson v. Louisiana, 406 U.S. 356, 362 (1971); In re Winship, supra. And, "assuming that state remedies have been exhausted, and that no independent and adequate state ground stands as a bar, it follows that such a claim is cognizable in a federal habeas corpus proceeding." Jackson v. Virginia, 443 U.S. at 321 (citations omitted).

3. While we recognize potential practical problems related to the proper timing of habeas "evidence sufficiency" review, cf. Stevens v. Circuit Court of Milwaukee County, 675 F.2d 946 (7th Cir. 1982), we believe that here review of Lydon's claim before state court retrial was appropriate. For one thing, Lydon's sufficiency of the evidence claim is

part of his double jeopardy attempt to prevent the retrial with which he is directly and immediately threatened. He seeks habeas relief now to avoid the very psychological and material hardships of a second trial that the Double Jeopardy Clause seeks to prevent. See Green v. United States 355 U.S. 184, 187-88 (1957). Unless habeas review is available before the second trial, a meritorious "evidence insufficiency" claimant would have to suffer those hardships before winning his case. Benson v. Superior Court Department of the Trial Court of Massachusetts, 663 F.2d 355, 359 (1st Cir. 1981). This consideration led the Supreme Court to characterize a double jeopardy ruling in a federal trial court as a "collateral order," allowing an immediate appeal under Cohen v.

Beneficial Industrial Loan Corp.,337 U.S. 541 (1949). Abney v. United States, 431 U.S. 651 (1977). This consideration does not settle the timing question, for Lydon has a legitimate double jeopardy claim only if he can reverse the earlier ruling that the evidence was sufficient. And it is the timing of this latter review that is at issue. See, e.g., United States v. Becton, 632 F.2d 1294 (5th Cir. 1980), cert. denied, 102 S.Ct. 141 (1981). Nonetheless, this factor argues in favor of speedy habeas review.

For another thing, all state remedies on the evidence sufficiency claim have been exhausted, thus satisfying the explicit exhaustion requirement of § 2254 and the similar implicit requirement of § 2241. See Braden v. 30th Judicial Circuit Court of

Ky., 410 U.S. 484, 490 (1972). None of the state courts to which Lydon brought his claim actually ruled on the sufficiency of the evidence, and, under the theory announced by the Massachusetts Supreme Judicial Court, the first-tier judge's determination that the evidence was sufficient will never be reviewed anywhere within the Massachusetts system. See Lydon v. Commonwealth, 1980 Mass. Adv. Sh. at 1924, 409 N.E.2d at 752.

Moreover, we are aware of no "independent and adequate state ground" now barring review. Jackson v. Virginia, 443 U.S. at 321. See Estelle v. Williams, 425 U.S. 501 (1976); Francis v. Henderson, 425 U.S. 536 (1976); Fay v. Noia, 372 U.S. 391, 430-34 (1963). Indeed, Lydon's conviction at the second trail would

not, we should think, bar a federal habeas court from examining the sufficiency of the evidence at the first trial. Cf. Fay v. Noia, 372 U.S. at 433-34. Jackson mandates a federal "evidence sufficiency" examination; and, as we shall discuss further in Part IV below, Burks invalidates a second trial where the first conviction rests upon insufficient evidence.

Further, Massachusetts has not sought to postpone habeas review until after the second trial. Rather, the Supreme Judicial Court delayed Lydon's retrial while it considered his double jeopardy claim. The Commonwealth did not attempt to proceed with the second trial pending resolution of Lydon's federal claim. It has not argued that a speedy retrial is important.

Finally, in principle we deal here with habeas review where there is no state appellate review. In principle, habeas then involves only one set of review procedures. Since most states typically provide one such review procedure prior to a retrial--where, for example, a defendant appeals a conviction-the additional delay that habeas may bring here is likely to be no greater than in the typical state case with state appellate review before retrial.

At the same time, we note two factors that militate against allowing habeas review prior to retrial. First, were such review generally available, it might create practical problems when a defendant convicted in a state court appeals, alleging "evidence insufficiency" as one of a number of

grounds for reversal. The state appellate courts may well reject the "evidence insufficiency" claim, yet order a retrial on other grounds. Can the defendant in such a case then force the state to run the gauntlet of federal habeas proceedings on the "evidence insufficiency" issue prior to his state retrial? Can he obtain delay of the retrial, regardless of the merits of his claim, and thereby, through elapsed time and fragile memory, reduce his chances of subsequent conviction?

Second, to hold that defendants generally seek federal habeas "evidence insufficiency" review prior to a state retrial may seem anomalous when contrasted with Fourth, Fifth and Ninth Circuit cases denying a federal defendant appellate review of a similar claim prior to federal retrial. United

States v. Ellis, 646 F.2d 132 (4th Cir. 1981); United States v. Rey, 641 F.2d 222 (5th Cir.), cert. denied, 102 S.Ct. 318 (1981); United States v. Becton, supra; United States v. Carnes, 618 F.2d 68 (9th Cir.), cert. denied, 100 S.Ct. 3028 (1980). In each of these cases, jury deadlock resulted in a mistrial. The defendant's motion for acquittal on the basis of the insufficiency of the evidence was denied, and a new trial was ordered. The defendant then moved to dismiss on the grounds of double jeopardy, in turn, based on a claim of "evidence insufficiency." The appellate court in each case dismissed the appeal, on the grounds that it was interlocutory and not appealable under the collateral order exception to the finality rule. The essence of the court's position was that the defendant was merely appealling

the trial court's decision that the evidence was constitutionally sufficient. Such an issue, each court held, was not "collateral" under the Cohen/Abney test; but rather was directly involved in the merits of the case. Therefore, the appellate court would not review that decision, even to reach the double jeopardy issue. There are other circuits taking a different view. See United States v. McQuilkin, 673 F.2d 681 (3d Cir. 1982) (interlocutory appeal on "evidence insufficiency" allowed in federal case); Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981) (habeas review of evidence insufficiency allowed prior to state retrial). We do not choose between the views of the Fourth, Fifth and Ninth Circuits on the one hand, and the Third and Sixth on the other. Rather, we

simply note that it would be odd if, under the view of most circuits, a federal defendant were denied interlocutory appeal, while a state defendant was entitled to receive federal habeas review before his retrial.

While we recognize the force of these latter two sets of arguments, we do not find them determinative here. For one thing, the practical problem of interfering with ongoing state proceedings might be mitigated through wise use of the habeas corpus court's power to stay those proceedings, see 22 U.S.C. § 2251, reserving use of that power for those cases that present a strong showing of likely success on the merits, and otherwise taking appropriate account of the "comity" principles discussed in Younger v. Harris, 401 U.S. 37 (1971). Compare Robinson v. Wade,

686 F.2d 298, 302-03 n.7 (5th Cir. 1982), and Baker v. Metcalfe, 633 F.2d 1198, 1200 n.3 (5th Cir.), cert. denied, 102 S.Ct. 2085 (1981), with Stevens v. Circuit Court of Milwaukee County, supra, and Sparks v. Garrison, 446 F. Supp. 649 (M.D.N.C. 1978), aff'd 612 F.2d 1310 (4th Cir. 1979). Insofar as the habeas court takes account of the need for speedy retrials, the sense of anomaly with the federal "interlocutory appeal" cases (which themselves rest on the need for workable procedures) is diminisned.

For another thing, the case before us is one in which, for reasons previously set out, the need for postponement of habeas review is minimal. We therefore restrict our holding to such a case. We conclude that habeas review of "evidence

insufficiency" was proper at this time in the case before us. But, we specifically decline to extend our holding to other cases not characterized by the several factors favoring review listed here. We postpone to another day any authoritative decision about "habeas timing" in such other cases.

III

The district court reviewed the record and concluded that the evidence was, in fact, insufficient. The Commonwealth's complaint alleged that Lydon possessed implements designed to break open a "depository" (here an automobile), with the intent to steal money or property from it, in violation of Mass. Gen. Laws ch. 266, § 49. The evidence at trial was as follows. A plainclothes police officer testified

that late one night he observed the defendant and another man in the process of breaking into the right front window of a car. When the two had opened the car, both of them climbed into it. As the witness and other policemen moved in, an alarm went off in the car and both men climbed back out. On searching the defendants, the police found a bottle of whiskey. Nearby, they found a dentpuller and a screwdriver. The witness stated that the defendants had no time to take anything <u>from</u> the car. The evidence permitted an inference that the defendant intended to steal the car itself, that he intended to take it for a short ride, or that he merely intended to go to sleep in it. But under Massachusetts law, it was impossible to say that the Commonwealth had shown beyond a reasonable doubt that the

defendant intended to steal money or property from the car.

This was the view of a Massachusetts court in an almost identical case. The court stated,

> Breaking into an automobile merely with the intent to use it is not so 'remote according to the ordinary course of events' as to allow us to discount such an intent in this case and permit the jury to conclude that there was an intent to steal from the automobile merely from the breaking.

Commonwealth v. Armenia, 4 Mass. App. Ct. 33-39, 340 N.E.2d 901, 904-05 (Mass. App. 1976) (citation omitted). Because the Commonwealth had not shown "an intent to steal from the automobile," the court set the jury's verdit aside.

Having examined these facts and the Massachusetts authority interpreting the statute, we must conclude that the federal district court's determination

that the evidence was not constitutionally sufficient to support conviction is not erroneous. This is not to say that defendant was innocent of all crimes. But one can be convicted only of the crime charged. And, as to that crime, an intent to steal from the automobile was not shown.

IV

Once a habeas court has decided that the evidence at Lydon's first trial was constitutionally insufficient--that no rational trier of fact could have found him guilty as charged beyond a reasonable doubt--the Double Jeopardy Clause, as interpreted in Burks, forbids his retrial. As classically stated:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should

> not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957). In applying this purpose, the Supreme Court has attached special weight to judgments of acquittal, Tibbs v. Florida, 102 S. Ct. 2211, 2218 (1982); see United States v. DiFrancesco, 449 U.S. 117, 129 (1980); United States v. Scott, 437 U.S. 82, 91 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). "A verdict of not guilty whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial." Tibbs v.

Florida, 102 S. Ct. at 2218; see, e.g., United States v. Martin Linen Supply Co., 430 U.S. at 564; United States v. Ball, 163 U.S. 662, 666-71 (1896). And, in Burks, the Court specifically held that a reversal of a conviction because the evidence was constitutionally insufficient has the same effect as an acquittal, for it means that no rational fact finder could have found the defendant guilty. Burks v. United States, 437 U.S. at 16; Tibbs v. Florida, 102 S. Ct. at 2217-18.

The underlying rationale, explained fully in Burks, is that the prosecution gets one full and fair opportunity to muster its evidence. If it nonetheless produces a case "so lacking that it should not have even been submitted to the jury," then it ought not to have

another opportunity to supply additional evidence.

> Since we necessarily afford absolute finality to a jury's verdict of acquittal--no matter how erroneous its decision--it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

437 U.S. at 16 (emphasis in original). Tibbs v. Florida, 102 S. Ct. at 2217-18; Hudson v. Louisiana, 450 U.S. at 43. To allow the prosecution that opportunity--to learn from the first trial and to produce a more adequate case the second time--is to allow the type of oppression the Double Jeopardy Clause was designed to guard against. Burks v. United States, 437 U.S. at 11; Green v. United States, supra.

Where "evidence insufficiency" is found, the reasons that typically allow retrial when an appellate court finds trial error are not present. As the Court explained in Burks,

> Reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence . . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. . . .
>
> The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution

> cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.

Burks v. United States, 437 U.S. at 15-16 (footnote omitted).

We have quoted at some length from the Supreme Court's recent double jeopardy cases because both the Court's language in these cases and the rationale that it embodies make clear that the Double Jeopardy Clause forbids retrial here. The prosecution had a full and fair opportunity to present its evidence. The evidence was such that no rational trier of fact could have found Lydon guilty of the crime charged. Had the trier of fact acquitted Lydon, Massachusetts law would have barred his retrial. The process of judicial review has conveniently pinpointed the evidence which was lacking, and retrial simply

gives the prosecutor another opportunity to supply it. In these respects, it is difficult to see any significant difference between this case and the situation in Burks of a trial followed by appellate reversal for insufficient evidence.

The Supreme Court has twice rejected double jeopardy attacks on the constitutionality of the Massachusetts, and other similar two-tier systems. However, neither of these cases affect our conclusion here. Colton v. Kentucky, 407 U.S. 104 (1972), concerned the question of the state's power to impose an enhanced sentence at the second trial; it is not directly relevant to the issue before us. Ludwig, decided prior to Burks, holds that, as a general matter, the Double Jeopardy Clause does not forbid the

retrial de novo of one previously convicted. Its reasoning, however, supports a finding of unconstitutionality here.

The Ludwig Court reached its conclusion primarily by drawing a parallel between a "two-tier" defendant seeking a new trial after conviction, and an ordinary convicted defendant seeking a new trial on appeal. The Court wrote in 1975:

> The Massachusetts system presents no danger of prosecution after an accused has been pardoned; nor is there any doubt that acquittal at the first tier precludes reprosecution. Instead, the argument appears to be that because the appellant has been placed once in jeopardy and convicted, the State may not retry him when he informs the trial court of his decision to "appeal" and to secure a trial de novo.
>
> Appellant's argument is without substance. The

> decision to secure a new trial rests with the accused alone. A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these circumstances, it has long been clear that a State may reprosecute. United States v. Ball, 163 U.S. 662 (1896). The only difference between an appeal on the record and an appeal resulting automatically in a new trial is that a convicted defendant in Massachusetts may obtain a "reversal" and a new trial without assignment or error in the proceedings of the first trial.

427 U.S. 631-32. This parallel between the "two-tier" trial and the ordinary trial plus appeal supported the Massachusetts system's constitutionality prior to Burks. But Burks carved out an exception to the general rule that retrial is permissible. Since Burks

requires release when the evidence was constitutionally insufficient at the first trial, given the analogy upon which Ludwig rested, Ludwig requries the same result with the two-tier system.

The single respect in which this case differs from both Ludwig and the ordinary instance considered in Burks is that, under the modification made in the Court Reorganization Act of 1978, a defendant now may freely choose whether to subject himself to the system's first tier. If he wishes, he can proceed directly to the second. The Massachusetts Supreme Judicial Court believed this fact critical. It apparently felt that a defendant who had voluntarily chosen to subject himself to the first tier thereby waived whatever rights he may have had to any relief other than a new trial. Such a waiver

would be reasonable in light of the unusual benefit the system grants him, namely a new trial for the asking.

While we agree that it would be reasonable to waive a Burks-type right to obtain this benefit, we do not agree that the defendant did so here. It is clear, that where constitutional rights are at issue, there must be an "intentional relinquishment of a known right or privilege" before they can be waived. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Although prior to Burks the existence of a constitutional right may have been in doubt, after that case, it is apparent that the harm at issue--the prosecutor's second chance to supply constitutionally sufficient evidence--has a constitutional dimension. And Burks itself indicates that a waiver of the defendant's right

to avoid that harm is not to be implied lightly. That case specifically denied that a defendant's decision to seek a new trial on appeal automatically waived his right (if the evidence proved insufficient) to avoid a new trial altogether.

There was no intentional relinquishment of the right at issue in this case. There is no indication that the defendant clearly understood he was waiving any right to potential freedom from retrial; to the contrary, if anything, he believed that the state could not retry him again should the evidence at the first trial prove constitutionally insufficient. And, he has vigorously asserted this claim throughout.

There is no special circumstance present here that suggests that anything

less than an explicit waiver is appropriate. Amici argue that the district court's ruling would significantly impair the workings of the present system. But that is not so. The present system fully informs defendant of their choice and its implications for their right to a jury trial. Indeed, the trial must "be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of [trial de novo]." Mass. Gen. Laws ch. 218, § 26A. Rule 21(A) of the Initial Rules of Criminal Procedure for the District Court provides:

> The oral notice of right to first-instance jury trial shall include a statement to the defendant that is he or she waives this right, he or she will receive a trial before a judge and if not satisfied with the results of

that trial will be able to appeal for a new trial before a jury.

The Massachusetts Supreme Judicial Court has itself suggested that consideration "be given to enlarging the consent form so that the defendant acknowledges that his only avenue of relief from any error in the bench trial is a trial de novo." Lydon v. Commonwealth, 1980 Mass. Ad. Sh. at 1924 n.13, 409 N.E.2d at 751 n.13. We see no reason to indulge in the legal fiction of "implied consent" or "constructive waiver" when the reality could proceed to a full, ordinary single level jury trial if he did not choose to waive the right here at issue. It may be that many defendants would waive the Burks-type right, for it would come into play only in a very limited circumstance, namely, when a first-tier judge wrongly

concludes that the evidence was constitutionally sufficient to convict and a later court reverses the ruling. But, whether or not to waive is a decision that an informed defendant ought to make.

For these reasons, we believe that the district court properly issued a writ of habeas corpus. We note the Commonwealth's argument that the district court lacks the additional power specifically to enjoin a second trial. But, rather than explore the merits of this technical question of law, we shall simply follow the path of the court in Delk v. Atkinson, 498 F.Supp. 1282 (M.D. Tenn. 1980), rev'd on other grounds, 665 F.2d 90 (6th Cir. 1981) which found it "unnecessary to order specific injunctive relief barring state retrial . . ., because the Court

assumes that the State will act in good faith in light of the Court's decision and dismiss the charges against the petitioner." 498 F. Supp. at 1284. The appropriate relief is simply issuance of the writ providing Lydon his freedom from being required to answer any summons to a second trial. We have no reason to believe the Commonwealth wil seek to retry him unless this decision is reversed.

Affirmed.

CAMPBELL, Circuit Judge (Dissenting). The court may be right. Certainly Judge Breyer's opinion deals scrupulously with the issues, and I do not question the intelligence and logic reflected in my colleagues' decision. Yet I see this as one of those cases where the relentless application of secondary precepts developed in other, very different settings leads ultimately to a foolish and wrong result -- a result not dictated by the Constitution, and one which has the unfortunate effect of undermining a useful and fair state procedure.

My colleagues are sensitive to the latter problem. The court's opinion relfects its deep concern over the harm to the Massachusetts two-tier system which may now occur, as a result of our judgment, from frivolous petitions and appeals alleging insufficiency of

evidence and double jeopardy. Whether there are ways around this, through more elaborate waiver forms or other mechanisms, I do not know. I do know that the Massachusetts system is likely to become more costly and less coherent as a result of our decision -- at a time when virtually every commentator, including the Chief Justice of the United States, is decrying the diminishing ability of both state and federal judicial systems to cope with the caseload. Moreover, I fear that decisions such as this reflect an ongoing, perhaps irreversible tendency of federal courts to treat subsidiary principles announced in constitutional decisions as if they were propositions of plane geometry, and to extend and apply them rigidly, with the unfortunate result that healthy experimentation and

diversity at state and local levels is made increasingly less possible.

Here, building on Burks v. United States, 437 U.S. 1 (1978), our court interrupts the practical functioning of Massachusetts' two-tier system -- a fair and useful system which the state offers as an elective option to criminal defendants charged with misdemeanors and lesser felonies. In Burks, the Court held that the double jeopardy clause prohibits a second trial following the reversal of a conviction obtained with insufficient evidence. Here, we fasten on the fact that a defendant convicted at a first-tier bench trial has no way to avoid a second-tier trial if he wishes to challenge the state's case either on the facts of the law: thus he must be "tried again" even if the earlier proceeding at which he was

convicted was lacking in sufficient evidence. To avoid this, we insist that he and other first-tier convicted defendants must be allowed to raise their insufficiency claims before the second trial so they can be discharged if they prevail. We thus throw a substantial monkey wrench in the two-tier system whose distinguishing feature and, indeed, supreme virtue is that it offers a second trial, not an appeal on the law.

I would contend that the reasonable way to analyze the double jeopardy issue in this case is to look at the Massachusetts system as a whole, not in isolated fragments. If this is done, I see little ground for serious concern that the policy underlying the double jeopardy clause is being offended.

To begin with, the two-tier system was not imposed on the defendant. Massachusetts defendants may elect to receive an initial jury trial followed by a conventional appeal. There is thus no issue of Massachusetts forcing Lydon to accept a system which provides, in the second stage, for a de novo trial rather than a conventional appeal.

Second, the two-tier procedure Lydon elected affords all the most basic double jeopardy protection that would be afforded in a more conventional system. As Massachusetts has long recognized, a judgment of acquittal at the first tier precludes later prosecution at the second level. And it is well established that trial de novo following a first-tier conviction does not ordinarily offend the double jeopardy

clause. Ludwig v. Massachusetts, 427 U.S. 618 (1976).

Third, the two-tier system affords distinct benefits to a criminal defendant not present in the more conventional system. These benefits flow from the very same aspect of the system which Lydon criticizes. Under the two-tier system, a defendant receives two full opportunities to be acquitted on the facts. The conventional American criminal system, unlike that in some European countries, permits virtually no appeallate review of factual determinations. The opportunities now afforded to suppress evidence on legal and constitutional grounds do not help on this score: indeed, the most worrisome ground for a possible miscarriage of justice -- misidentification by a witness --

remains largely untouched by the jurisprudence of the past generation. The Massachusetts two-tier system, however, allows the possibly innocent defendant two opportunities for acquittal on the facts. That is a benefit of no small dimension. For defendants generally, it is far more meaningful than retaining a right to appeal from the first trial on grounds of insufficient evidence. In foregoing the latter, convicted defendants gain the right not to be convicted finally unless the prosecution twice proves their guilt beyond a reasonable double.

Fourth, while the de novo trial allows the prosecution to put in a different and perhaps stronger case, the same is of course true for the defendant. Bearing in mind that, in the usual case, the first-tier court can be

expected to acquit where the evidence is insufficient, it will be the rare case where a convicted defendant with a valid insufficiency claim is forced to stand trial for a second time. The far more usual case will be that of the defendant convicted at the first tier on legally sufficient (if factually close) evidence. Under the Massachusetts system, that defendant gets the distinct benefit of a brand new trial, in which he has all the tactical benefits of knowing the prosecution's case and shifting his defenses to meet it.

Fifth, in the rare case of someone like Lydon who was convicted at the first tier on insufficient evidence, the defendant has no lack of opportunities for later vindication: first, he may be acquitted on motion after the prosecution puts in its case in the de

novo trial, assuming the judge feels the prosecution's evidence is insufficient. Second, the jury may acquit him at the second trial. Third, he may later win on an insufficiency claim relative to the second trial in a Massachusetts appellate court. While technically he is "tried again", the second stage proceeding can be regarded as but an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings during which, sooner or later, a defendant receives more -- rather than less -- of the process normally extended to criminal defendants in this nation. To deny a state the right so to structure its optional criminal process is to approach saying that the Constitution imposes for all time a single model of criminal process.

Sixth, Lydon argues that the second-tier trial is unfair because it allows the prosecution to improve on its case -- to put in more evidence. As noted, any disadvantage would seem to be more than outweighed by the advantage to most defendants of being able to impove on their defense in the second trial. But beyond this, the likelihood of the prosecution's obtaining additional evidence would seem slight. The prosecution has every incentive to put in its best evidence in the first tier. If it does not, and acquittal results, it can never proceed again. Moreover, the stronger the showing, the more likely the defense is to accept a firstround conviction as final, without seeking a de novo trial. It follows that appellate review of the second conviction will commonly provide an

effective remedy in the rare instance in which both trial courts and the jury improperly assess the sufficiency of the evidence. With these safeguards in place, there is every reason to believe that the two-tier system -- if permitted to function without interruption -- will vindicate claims of evidentiary insufficiency.

Lydon's predicament illustrates the point. The court concludes that the evidence introduced at Lydon's trial failed to pass muster under the rule of Jackson v. Virginia, 443 U.S. 307 (1979). Yet the two-tier system, were it permitted to run its course, would surely correct the error. Of course, part of the process involves Lydon's submission to a second trial. But the second trial typically poses little threat that the Commonwealth will

present new, more substantial evidence; indeed, a review of the record suggests that there is probably no effective way to supply evidence of intent. And even if this were to occur in isolated cases, the result is hardly so unfair, when weighed against the system's countervailing benefits to defendants as a whole, as to warrant restructuring the whole system.

Finally, I return to the point first made -- that the two-tier system was not imposed on Lydon. Lydon's submission to a second trial is part of the bargain he struck with the Commonwealth when he chose the two-tier system with its distinct advantages as well as this one disadvantage. The Commonwealth requires a defendant who wishes to be tried in the two-tier system to sign a written waiver of his right to trial by jury.

At the time Lydon signed the waiver he was represented -- as the Commonwealth requires[1] -- by an attorney whose competence is undisputed. Any attorney, and indeed most clients, would know that in choosing the two-tier system, a defendant surrenders his right to challenge legal errors committed in the initial proceeding; in place of this right, he obtains the more important right to require a trial de novo, after which, of course, there is the conventional appellate process. See Mann v. Commonwealth, 359 Mass. 661, 664, 271 N.E.2d 331, 333-34 (1971). Lydon has never asserted that he lacked knowledge of the limited right of appeal

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1/ The Commonwealth requires defendants to be represented by counsel at the time they choose the two-tier system unless they have waived the right to counsel. See Mass. Gen. Lws. ch. 218 § 26A.

in the two-tier system. Thus, we may assume that he had a sufficient practical understanding of the consequences of his choice.

This court nonetheless holds that Lydon's intelligent, informed decision to be tried in the two-tier system did not constitute a waiver of his right to challenge the sufficiency of the evidence at his bench trial. The court does not conclude that the right is so fundamental as to defy any form of waiver. Rather it holds that Lydon's decision did not constitute an "intentional relinquishment of a known right." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). In so concluding, the court implies that a written waiver of the right would pass constitutional muster.

Thus, the court invites the Commonwealth to adopt a procedure that

insofar as I can determine, would have no practical impact on a defendant's choice of the two-tier system. Under the suggested written waiver procedures, a defendant would rely heavily on the advice and expertise of his attorney in deciding whether to waive his right to challenge evidentiary sufficiency. In making this strategic choice, the attorney would be called on to weigh precisely the same factors that Lydon's attorney presumably weighed in this case. The effect of the present opinion is to create the possibility of a host of new technicalities which may vitiate the practical usefulness of the de novo system. I would hold Lydon to the consequences of his choice.

In conclusion, I fear that the court's decision is a further step in locking the states into rigid,

formalistic criminal procedures, without regard to the actual justice or injustice of a given system, merely to satisfy refined, logical principles derived from prior cases decided in other contexts. Such an approach provides employment for attorneys, increases the expense of justice, and enlarges the possibility that a guilty person may get off on a technicality. It does little to advance the cause of justice. The Massachusetts two-tier system must be viewed as a whole, not forced through a strainer developed from cases dealing with a different system. If so viewed, I believe that it does not create double jeopardy. What it does do is provide a practical trial option with many advantages to both sides.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

MICHAEL LYDON, Petitioner	)	
v.	)	
THE JUSTICES OF THE BOSTON MUNICIPAL COURT ET AL., Respondents	)	CIVIL ACTION NO. 81-2311-G

MEMORANDUM AND ORDER ON HABEAS CORPUS PETITION

April 13, 1982

GARRITY, J.

Petitioner Michael Lydon seeks a writ of habeas corpus to prevent Massachusetts from trying him a second time pursuant to its two-tier trial system. Petitioner contends that a second trial under the circumstances of his case would violate the double jeopardy clause of the federal constitution. Respondents have moved to

dismiss on the grounds that the court lacks jurisdiction, that petitioner has not exhausted state remedies and that the double jeopardy clause does not bar a retrial as provided here.

Massachusetts provides that criminal defendants to certain specified charges who are to be tried in the Boston Municipal Court may elect to waive the right to a jury trial in the first instance and instead proceed to a bench trial. Mass. G.L. c. 218, §§ 26, 26A. If the defendant is dissatisfied with the result of the bench trial, he may then elect to proceed to a jury trial de novo as his sole available remedy. He need not, however, undergo the jury trial but may instead accept the verdict of the judge at the bench trial in the Boston Municipal Court. And, if he is acquitted after the bench trial, the

state cannot subject him to the second trial.

Petitioner, who was charged with illegal possession of burglarious implements, elected an initial bench trial and was convicted. His objection that the prosecution has failed to introduce sufficient evidence of the requisite illegal intent, an element of the crime, was denied. He then required a jury trial de novo, but prior to the jury trial moved to dismiss the charges on the ground that retrial would violate the double jeopardy clause. That motion was denied without a hearing. Lydon then petitioned the single justice session of the Supreme Judicial Court for relief under G.L. c. 211, § 3. The prosecution conceded, and the single justice concluded, that the evidence had in fact been insufficient to convict.

The single justice did not, however, report that finding to the full Supreme Judicial Court but instead stayed the trial and reported two other questions to the full court: Whether a defendant would be denied his right not to be placed in double jeopardy if required to go through a jury trial requested by him when the evidence at the bench trial was inadequate to convict and whether, assuming a jury trial would violate the double jeopardy clause, the jury trial judge could reconsider the sufficiency of the evidence if the judge at the bench trial had decided it was sufficient. The S.J.C. held, in a 5-2 decision, that the jury trial under the Massachusetts two-tier system did not violate the double jeopardy clause where the initial conviction was supported by insufficient evidence. All seven

justices, however, believed that if such a jury trial would violate the double jeopardy clause, the jury trial judge could reconsider the adequacy of the evidence at the first trial. Lydon subsequently filed his petition in this court for habeas relief. The court received briefs and heard argument on November 4, 1981.

A district could has jurisdiction to consider an application for a writ of habeas corpus on behalf of an individual in custody pursuant to judgment of a state court, only if the individual "is in custody in violation of the Constitution of laws or treaties of the United States", 28 U.S.C. § 2254(a), and has exhausted available state remedies, 28 U.S.C. § 2254(b). Petitioner has satisfied the jurisdictional prerequisites.

The "in custody" requirement of the habeas corpus statute does not condition habeas jurisdiction on actual physical confinment or restraint. Rather, it refers to various restraints on liberty "not shared by the public generally." Jones v. Cunningham, 1963, 371 U.S. 236, 240. Thus, an individual who has been released on his own recognizance following conviction is "in custody" within the meaning of the habeas corpus statute. Hensley v. Municipal Court, 1973, 411 U.S. 345. Petitioner is such an individual.

Although an individual released on bail or on his own recognizance would be "in custody" he would not necessarily be able to petition for habeas relief. Rather, "he must still contend with the requirements of the exhaustion doctrine if he seeks habeas corpus relief in the

federal courts." Hensley v. Municipal Court, supra at 353.

Defendants here point out, however, that 28 U.S.C. § 2254(a) confers jurisdiction on this court to entertain a habeas petition brought by one in custody pursuant to a state court judgment "only on the ground that he is in custody in violation of the [United States] Constitution" or other federal law. Here, defendants argued, petitioner does not challenge the constitutionality of his custody but only the ability of the court to proceed with his jury trial de novo. We reject this argument.

First, petitioner implicitly claims that "he is in custody in violation of the constitution." Had the court at petitioner's bench trial found petitioner not guilty, there would, of

course, be no basis for the imposition of bail or other custody. Here petitioner contends that the evidence at the bench trial was insufficient to convict him so that he should have been found not guilty. A second trial, petitioner contends, would violate his rights under the double jeopardy clause. Yet the prospect of the second trial constitutes the basis for subjecting petitioner to custody. Therefore, petitioner's allegation is, essentially, that the custody violates the Constitution.

Second, it often is appropriate to assume jurisdiction to consider the merits of a pretrial writ of habeas corpus where petitioner claims the pending trial would place him in jeopardy a second time for the same offense. "Because the double jeopardy

clause is designed to protect a defendant not only from double conviction but also from being subjected twice to the trial process itself . . . a federal court is in the extraordinary position of having no way to protect a defendant's constitutional rights other than to consider a petition before trial." Benson v. Superior Court Department of the Trial Court of Massachusetts, 1 Cir. 1981, 663 F.2d 355, 359; cf. Abney v. United States, 1977, 431 U.S. 651 pretrial order denying motion to dismiss indictment is appealable to preserve defendant's double jeopardy rights). Thus, we conclude that the requirements of 28 U.S.C. § 2254(a) are satisfied where an individual who is in custody pending a trial asserts that the trial would violate the double jeopardy clause.

For habeas jurisdiction to exist, however, the petitioner must also have exhausted available state remedies. 28 U.S.C. § 2254(b). Even where the petition is based on a double jeopardy claim, the petitioner retains some responsibility to exhaust pretrial opportunities to raise that claim before the state court. Benson v. Superior Court Department of the Trial Court of Massachusetts, supra at 359. Petitioner here has done so. As recounted above, Lydon (a) moved to dismiss charges against him on the grounds that the evidence at the bench trial was insufficient, (b) petitioned the single justice session of the S.J.C. for relief from the denial of that motion, (c) presented the same claim he presents here to the S.J.C., and (d) petitioned the United States Supreme Court for a

writ of certiorari, which was denied. He has exhausted all available state remedies short of submitting to the second trial. Benson requires that he do no more. See also Drayton v. Hayes, 2 Cir. 1979, 589 F.2d 117, 120-21. To hold that the exhaustion requirement means that petitioner must face a second trial before seeking habeas relief might subject him to one of the evils which the double jeopardy clause proscribes--multiple trials--in order to qualify for a determination of whether the trial violated that clause.

Having determined that this court has jurisdiction to consider this habeas petition, we turn now to petitioner's substantive claim that application of the Massachusetts two-tier system violated rights the double jeopardy clause protects. The corpus of writing

on this case already includes two scholarly opinions by justices of the S.J.C. which clearly present the opposing argments, Lydon v. Commonwealth, 1980 Mass. Adv. Sh. 1915, 409 N.E. 2d 745, cert. denied 1980, 449 U.S. 1065, and a lengthy law review discussion. See Comment, "Double Jeopardy Problems Presented by Two-Tier Systems," 69 Georgetown Law Journal 1525 (1981). We will not review and discuss again the competing arguments which Justices Wilkins and Liacos have so carefully presented and instead will incorporate their opinions by reference and confine our treatment to stating the considerations which ultimately have influenced our decision.

To begin with, we do not believe that any prior case cited by petitioner or respondent covers the precise

situation present here. In Burks v. United States, 1978, 437 U.S. 1, the Supreme Court held that the double jeopardy clause precludes retrial of a defendant whose conviction had been reversed by an appellate court solely for insufficient evidence even if defendant moved for a new trial. Recently, the court held in Hudson v. Louisiana, 1981, 450 U.S. 40, that Burks applies also when the trial court judge on a motion for a new trial, rather than a higher court on review, determines that the evidence was insufficient. This case differs from Burks in two ways which Justice Wilkins pointed out. Burks did not deal with a two-tier system. Moreover, unlike Burks, here no reviewing court has ruled, or would have the opportunity to rule that the evidence at the bench trial was

insufficient. Lydon v. Commonwealth, supra at 1919-20. Hudson, too, is distinguishable since the jury trial court in the present case denied Lydon's motion to dismiss. Cases upon which respondent relies, particularly Ludwig v. Massachusetts, 1976, 427 U.S. 618, and Colten v. Kentucky, 1972, 407 U.S. 104, in which the Supreme Court upheld two-tier systems, including the previous Massachusetts provision, against double jeopardy attacks, are also not controlling. Those cases did not address the situation in which evidence at the first trial was insufficient. See Lydon v. Commonwealth, supra at 1927 n. 1 (Liacos, J., dissenting). Moreover, those cases antedated Burks and rested on a premise that Burks substantially altered. The Court made that premise explicit in Ludwig, the

case in which it upheld the Commonwealth's prior two-tier system, when it said: "A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these circumstances, it has long been clear that the State may reprosecute." Ludwig v. Massachusetts, supra at 631-32. After Burks, however, a defendant who gains a reversal based on insufficient evidence at the first trial may no longer be reprosecuted. Thus, the Massachusetts system at issue in Ludwig no longer parallels the constitutional norm and Ludwig accordingly does not direct the outcome here.

Although the prior Supreme Court decisions may be distinguished in some particulars, we conclude based on the principles they represent that retrial of Lydon under the Massachusetts two-tier system would deny him rights protected by the double jeopardy clause if his conviction was, in fact, based on insufficient evidence. We take Burks as our starting point. It held that the double jeopardy clause of the Fifth Amendment confers a constitutional right on criminal defendants not to be retried when there was insufficient evidence to convict at the first trial. That rule also applies to state defendants, Greene v. Massey, 1978, 437 U.S. 19, and to defendants who seek a new trial, Burks v. United States, supra at 17.

We are mindful, of course, that the Constitution does not require states

generally to provide appellate review for criminal convictions. Griffin v. Illinois, 1956, 351 U.S. 12, 18, 21, 27; McKane v. Durston, 1894, 153 U.S. 684. But we do not believe that that rule, coupled with the fact that a state chooses not to provide for review of a bench trial verdict, immunizes the state from federal constitutional promises. Burks does not become relevant, in our view, only after a reviewing court has found the evidence insufficient to convict. Rather it bestows a constitutional right upon defendants not to be retried when the initial conviction rests on insufficient evidence. The state is duty-bound to protect that right. Recognizing that double jeopardy rights must be protected prospectively, courts have fashioned special procedures to do so. See, e.g.,

Abney v. United States, supra; Benson v. Superior Court, supra. Respondents' preoccupation with whether there was an appellate determination of insufficient evidence strikes us as "a formal nicety wholly unrelated to the purposes of the double jeopardy clause." Lydon v. Commonwealth, supra at 1928 (Liacos, J., dissenting).

Lydon did not waive the protection against double jeopardy either by electing initially a bench, rather than jury, trial or by moving for a jury trial following his initial conviction. There is no evidence that Lydon had a "meanginful choice" and made a "voluntary knowing relinquishment of a right," Green v. United States, 1957, 355 U.S. 184, 191-92, in submitting initially to a bench trial since it is not clear that he appreciated that in so

doing he was waiving rights protected by the double jeopardy clause. And Burks makes it clear that it "cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." Burks v. United States, supra at 17. See also Hudson v. Louisiana, supra.

Since conducting a jury trial de novo would abridge rights the double jeopardy clause protects, if Lydon's conviction rested on insufficient evidence, we conclude that petitioner does state a claim upon which relief can be granted and so deny respondent's motion to dismiss. We turn now to the merits of petitioner's claim. The question that remains is whether the evidence at the first trial was insufficient. Justice Wilkins, who considered the case in the single

justice session, concluded at page three of his "Reservation and Report of Questions Arising in the Plaintiffs' Petition for Relief Under G.L. c. 211, S 3" that "the evidence was not sufficient to warrant guilty findings." The S.J.C. majority made clear, in an opinion Justice Wilkins wrote, that he "did not sit as a reviewing court in determining the sufficiency of the evidence" but rather framed questions for the full court to consider. Lydon v. Commonwealth, supra at 1918 n. 6. Justice Wilkins also observed in the abovecited "Reservation and Report" that the "Commonwealth concedes that the evidence presented was insufficient to warrant a finding of guilty on the charges as set forth in the complaint."

Since Justice Wilkins did not sit as a reviewing court in assessing the

sufficiency of the evidence, we do not treat his "Reservation and Report" as an adjudication on the merits.[1/] Rather, in order to make an independent determination of the sufficiency of the evidence, we have reviewed the "Transcript of the Evidence" at Lydon's bench trial on November 9, 1979, a copy of which, stipulated by the parties to be accurate, is Appendix C to the petition. Justice Wilkins pointed out at page 3 of his "Reservation and Report" that the Commonwealth's complaint alleged that Lydon knowingly possessed implements designed to break open a depository (here an automobile)

1/ We do, however, adopt and incorporate by reference the helpful discussion and reasoning on pages 3 to 7 of his "Reservation and Report" to the extent pertinent to our determination of the sufficiency of the evidence.

to steal money or property from it, in violation of Mass. G.L. c. 266, § 49. The trial transcript contains "no evidence that Lydon intended to steal money or property from the automobile, an essential element of the crime charged. Thus, we conclude, based on our review of the transcript, that the evidence at petitioner's bench trial was insufficient to convict him. It follows from the earlier discussion of this memorandum that a trial de novo under Massachusetts' two-tier system would violate petitioner's double jeopardy rights. Accordingly, we grant the petition for a writ of habeas corpus.

We note, in concluding, that our holding, while granting the immediate petitioner's writ, need not eliminate nor even work substantial change in the operation of Massachusetts' two-tier

system. The defects could be cured in several ways. The state could expand the initial consent process so that a judicial officer would explain that if the defendant elected to begin with a trial his only recourse from a conviction would be a jury trial de novo, Lydon v. Commonwealth, supra at 1924 n. 13, and the constitutional significance of that waiver. The state could, alternatively, provide a forum to review the bench trial verdict. Indeed, the S.J.C. in Lydon unanimously agreed that if the two-tier system did infinge double jeopardy rights a judge at the jury trial session could properly decide a double jeopardy challenge to the sufficiency of the evidence. Lydon v. Commonwealth, supra at 1926, 1931. Or, the state could fashion a system that would preclude the prosecution from

offering new evidence at the second level. See, e.g., Swisher v. Brady, 1978, 438 U.S. 204.

ORDER

Consistent with, and pursuant to, this memorandum of law, we deny respondents' motion to dismiss and grant petitioner's petition for a writ of habeas corpus and, accordingly, order that petitioner be released from his unconstitutional custody, namely, the personal recognizance of $500 to ensure his appearance before the jury session of the Boston Municipal Court, and that he not be retried before the jury session of the Boston Municipal Court on the same charges for which he was already tried in the first tier of the two-tier system and convicted based on insufficient evidence. Since we

understand that petitioner, by claiming a jury trial de novo, wiped out the bench trial verdict and sentence so that petitioner is no longer subject to that sentence, we take no further action.

MICHAEL LYDON & another[1] vs. COMMONWEALTH.

Suffolk. May 6, 1980. — August 22, 1980.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, WILKINS, LIACOS, & ABRAMS, JJ.

Constitutional Law, Double jeopardy. *Supreme Judicial Court*, Superintendence of inferior courts. *Practice, Criminal*, "Two-tier" court system.

CIVIL ACTION commenced in the Superior Court for the county of Suffolk on February 5, 1980.

The case was reported by *Wilkins*, J.

Bonnie Spaccarelli Hannon (*Eva S. Nilsen* with her) for Michael Lydon.

Kenneth D'Arcy for Robert McDonald.

Michael J. Traft, Assistant District Attorney, for the Commonwealth.

Richard J. Hayes, William J. Leahy, Martin R. Rosenthal & Brownlow M. Speer, for the Massachusetts Defenders Committee, amicus curiae, submitted a brief.

WILKINS, J. This petition for relief under the general superintendence powers of this court (G. L. c. 211, § 3) is one of three similar cases decided today that raise questions concerning the application of the principles of *Burks* v. *United States*, 437 U.S. 1 (1978), to criminal cases in which the accused has had a trial before a judge without a jury (a bench trial), and, dissatisfied with the result of the bench trial, has sought a de novo trial before a jury. The petitioners, whom we shall call the defendants, argue that the double jeopardy clause of the Fifth Amendment to the Constitution of the United States, as construed in *Burks* v. *United States*, *supra*, requires that the charges against each be dis-

[1] Robert McDonald.

missed following his bench trial because the evidence at the bench trial was insufficient to warrant the convictions.

Under the statutory provisions concerning the trial of cases in the Municipal Court of the City of Boston (Municipal Court), each defendant has the right to a jury trial in the first instance, but the defendants in this case elected instead to have a bench trial, preserving their right to have a jury trial if they were dissatisfied with the result of the bench trial. See G. L. c. 218, § 26A, which is set forth in the margin.[2] The defendants argued to the judge at their joint bench trial in the Municipal Court that the evidence did not warrant their convictions. The judge, however, found them guilty, and the defendants exercised their statutory right to appeal for a trial by a jury of six. Before the jury trial commenced, however, the defendants moved in the Municipal Court's jury trial session to have the charges against them dismissed because the evidence at the bench trial was inadequate to justify their convictions. When this motion was denied, the defendants filed a petition in the single justice session of this court seeking relief under G. L. c. 211, § 3. The single justice stayed the trial of these cases in the jury session of the Municipal Court, and, accepting the defendants' claim that the evidence at the bench trial did not warrant their convictions, reserved and reported two questions to the full bench, which are set forth in the margin.[3] The first of these questions inquires whether a

[2] General Laws c. 218, § 26A, inserted by St. 1978, c. 478, § 188, reads as follows: "Trial of criminal offenses in the Boston municipal court department and in the divisions of the district court department shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section twenty-seven A. Such waiver shall not be received unless the defendant is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in those jury sessions designated by said section twenty-seven A for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance."

[3] "1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him with-

defendant would be denied his right not to be placed in double jeopardy if he were required to go through a jury trial, when the evidence at the bench trial was inadequate to support his conviction. The second question concerns the procedural issue whether, assuming the existence of a double jeopardy claim, a jury-trial judge could or should reconsider the question of the sufficiency of the evidence which a bench-trial judge had decided adversely to a defendant.

The issues are important to the effective operation of the two-tier trial system in effect in the District and Municipal Courts of the Commonwealth. The present two-tier system was adopted, effective January 1, 1979, as part of the reorganization of the Commonwealth's judicial system pursuant to Chapter 478 of the Acts of 1978, commonly known as the Court Reorganization Act. In order to achieve a prompt and efficient disposition of the great number of criminal complaints filed each year in the District and Municipal Courts of the Commonwealth, involving relatively minor crimes, the concept of a bench trial was retained from the Commonwealth's earlier two-tier procedure. However, the Court Reorganization Act introduced a procedure that gave a defendant the right to a jury trial without the necessity of a prior bench trial.[4] As we have noted, a criminal defend-

out waiving his rights, when the evidence at the bench trial was insufficient to warrant a conviction?"

"2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial has denied an appropriate request for a ruling that the evidence at the bench trial was insufficient?"

[4]This change in the two-tier system was proposed in the December, 1976, Report on the State of the Massachusetts Courts made by the Governor's Select Committee on Judicial Needs, commonly known as the Cox Committee. Recommendation 19 was "A defendant charged with a crime within the jurisdiction of the District Court should be offered an election between an immediate jury trial and an immediate bench trial subject to his right to claim a new trial with a six-person jury in the District Court." *Id.* at 32. Commenting on its recommendation, the Cox Committee said: "In this manner, the Commonwealth can eliminate the

ant now is granted the choice of a jury trial in the first instance or a bench trial followed, if he so requests, by a de novo trial before a jury (or another judge, if the defendant waives his jury right).[5]

The circumstances of the defendants' trial are not important to the resolution of the questions of law reported to the court. The single justice did not report the issue whether the evidence warranted the defendants' convictions.[6] We treat the case as presenting squarely the question whether double jeopardy principles bar the retrial of a defendant who voluntarily chose to have a bench trial when the evidence at the bench trial was inadequate to warrant a conviction. We conclude that the defendants' voluntary choice of a bench trial and subsequent choice of a trial de novo create a situation in which double jeopardy is not implicated. Thus, the defendants' constitutional challenge to the two-tier trial system, which provides a trial de novo as the sole means of obtaining relief from the unsatisfactory result in their bench trial, is without merit.

The defendants argue that they should not be required to undergo a second trial in order to have their convictions reviewed, because the evidence at their first trial was insuf-

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pitfalls and frustration of the present form of trial de novo and still retain an arrangement which disposes of minor criminal cases fairly yet with minimum cost." *Id.* at 33.

[5]The apparent preference of defendants for an initial bench trial, rather than an immediate jury trial, is demonstrated by data for the six months of operation of the Municipal Court's jury session under the new two-tier system. From January 1, 1979, through June 30, 1979, 1751 complaints were received in that session in which only 158, or about 9%, were complaints tried before a jury in the first instance. [1979] Annual Report, The Office of the Chief Administrative Justice of the Trial Court 35 & 37. We note that thousands of complaints were finally disposed of by convictions at bench trials because the affected defendants did not seek a jury trial. *Id.* at 36.

[6]The single justice did not sit as a reviewing court in determining the sufficiency of the evidence. Thus, any conclusion reached by the single justice on this issue was made for the purpose of reporting clearly framed questions to the full bench and is not an adjudication of the rights of the parties in this case.

ficient to warrant a conviction. They claim that a trial de novo would put them twice in jeopardy for the same crime, in contravention of the Fifth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment.[7] *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969). The defendants rely on *Burks* v. *United States*, 437 U.S. 1 (1978), to support their double jeopardy claim.[8] In that case, the Sixth Circuit Court of Appeals had reversed Burk's conviction because the evidence did not warrant a guilty finding and had remanded the case for consideration whether the circumstances warranted a new trial. *United States* v. *Burks*, 547 F.2d 968, 970 (6th Cir. 1976). The Supreme Court held, however, that it would be improper to retry Burks. The Court stated that a judgment of acquittal was required notwithstanding the fact that Burks had requested a new trial. 437 U.S. at 17-18.

The *Burks* case involved different circumstances from those before us because it dealt with an appellate determination that the evidence at trial did not warrant a conviction and a further determination that the double jeopardy clause barred a retrial in those circumstances. Burks was tried in a judicial system that provided for appellate review. No reviewing court has ruled on the sufficiency of the evidence at the bench trial in the present case. Under the two-tier system as it is designed to operate, no court would ever consider this issue. Thus, *Burks* v. *United States* is not applicable. The Court's holding in the *Burks* case was not that "the Double Jeopardy Clause precludes a second trial

[7] If the defendants have a valid double jeopardy claim, it properly should be dealt with in some forum before any second trial. *Costarelli* v. *Commonwealth*, 374 Mass. 677, 680 (1978) (Mass. Adv. Sh. [1978] 734, 737). Immediate relief would be appropriate because, in such a case, the second trial itself would offend the constitutional guarantee. *Id. Abney* v. *United States*, 431 U.S. 651, 660-661 (1977) ("It is a guarantee against being twice put to *trial* for the same offense").

[8] On the same day as the *Burks* decision, the Supreme Court held in *Greene* v. *Massey*, 437 U.S. 19, 24 (1978), that the *Burks* principle was applicable to the States through the Fourteenth Amendment.

once the reviewing court has found the evidence legally insufficient." 437 U.S. at 18 (emphasis supplied).

The Court in the *Burks* case did not consider the question involved in the case before us, namely, whether under double jeopardy principles a defendant convicted on inadequate evidence at a bench trial has a right to a reconsideration of that ruling prior to a trial de novo. The defendants seek to extend the holding in *Burks* v. *United States, supra*, by arguing that that case requires the Commonwealth to provide a procedure by which the defendants can have another judge pass on the sufficiency of the evidence presented at his bench trial.

The defendants are correct in stating that, if they were to obtain a judgment of acquittal due to the insufficiency of evidence presented at their trial, they could not be retried. Double jeopardy protection under the Federal Constitution is afforded to criminal defendants regardless of whether such acquittal occurs at a bench trial, *Kepner* v. *United States*, 195 U.S. 100, 133 (1904), at a jury trial, *United States* v. *Ball*, 163 U.S. 662, 671 (1896), or on appeal, *Burks* v. *United States, supra*. Massachusetts heeds this constitutional mandate.[9] *Ludwig* v. *Massachusetts*, 427 U.S. 618, 631 (1976). But double jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of

[9]The *Burks* opinion introduced no new concept in the disposition of criminal appeals in this Commonwealth. At least in recent times, an appellate determination that the evidence did not warrant a conviction has resulted in an order for the dismissal of the charges and not in a new trial. See *Commonwealth* v. *Delgado*, 367 Mass. 432, 439 (1975); *Commonwealth* v. *Silva*, 366 Mass. 402, 410-411 (1974) (If motion to suppress had been allowed, as it should have been, a directed verdict would have been required. Judgment of not guilty ordered). After the *Burks* decision, we ordered the entry of a judgment of not guilty, citing the *Burks* case, where the trial judge erroneously failed to strike the testimony of a witness and, when struck, the remaining evidence did not warrant guilty findings. *Commonwealth* v. *Funches*, Mass. , (1979) (Mass. Adv. Sh. [1979] 2559, 2572). It was clear in the *Funches* case that the Commonwealth could not cure the insufficiency in the proof. See further discussion of the *Silva* and *Funches* cases in *A Juvenile* v. *Commonwealth*, *post* 1939 n.5.

such conviction by resort to a second-tier trial. The distinction between a convicted defendant and an acquitted defendant in terms of double jeopardy protection was established in *United States* v. *Ball, supra* at 671-672. The validity of this distinction was reconfirmed in *United States* v. *Scott*, 437 U.S. 82, 88-89 (1978),[10] a case decided the same day as *Burks* v. *United States, supra.*

The defendants' argument that the Commonwealth has no legitimate state interest in retrying them overlooks the fact that the Commonwealth did not seek to retry them. The defendants were convicted of the crime of possession of burglarious instruments with the intent to commit larceny. The Commonwealth was content with that disposition. Although the defendants argue that the findings were erroneous, the convictions stood until the defendants requested a trial de novo, which was the only avenue of relief available to them.[11] The Commonwealth did not force the defendants to submit to a second trial. It simply did not provide the defendants a right of appeal or other review from their bench trial. None is constitutionally required. *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956).

A defendant's choice to have a bench trial in the first instance, without any prospect of review of errors occurring in the course of that trial, means that a considerable variety

[10] In the *Scott* case, the defendant was successful in obtaining a dismissal of an indictment because of preindictment delay. The Supreme Court, by a five-to-four vote, held that the government could appeal the dismissal because, if the appeal were successful, the defendant properly could be tried on the indictment without violating the defendant's double jeopardy rights.

[11] The situation here is analogous to the situation in *United States* v. *Ball*, 163 U.S. 662 (1896), where the Court held that the defendants' convictions were based on a fatally defective indictment. The Court held that, although the convictions below would not stand on appeal, "yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*." *Id.* at 669-670.

of errors might occur from which he could not obtain any relief. Many of these errors are of a type that could have a considerable effect on the result of the trial. The judge might misapply the law or improperly admit or exclude evidence, to the defendant's disadvantage (or advantage). There might be prosecutorial misconduct, or defense counsel's performance might be inadequate in a constitutional sense. However, errors of this nature in the trial of a case, even when they involve a misapplication of constitutional principles, have never been regarded as presenting a double jeopardy issue, that is, barring a second trial on double jeopardy grounds. "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Burks* v. *United States*, 437 U.S. at 15. And yet, an accused runs the risk of such errors by choosing to have an initial bench trial. We have never indicated that in making such an election the defendant must have knowingly considered and voluntarily waived all the potential errors of constitutional dimension.[12] But see *Ciummei* v. *Commonwealth*, Mass. (1979)[a] (explicit waiver of constitutional right of trial by jury required).

The two-tier court system has already withstood constitutional challenge in the United States Supreme Court. *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976). *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Some form of two-tier system is in effect in approximately one-half of the States. *Colten* v. *Kentucky*, *supra* at 112 n.4. It is difficult to conceive that the Supreme Court intended in its *Burks* decision to hold, by implication, that such a widely adopted system for dealing

[12] The United States Supreme Court has noted that "the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses." *Colten* v. *Kentucky*, 407 U.S. 104, 117 (1972), quoting from *Colten* v. *Commonwealth*, 467 S.W.2d 374, 379 (Ky. 1971).

[a] Mass. Adv. Sh. (1979) 1838.

with less serious crimes is unconstitutional. See *Greene* v. *Massey*, 437 U.S. 19, 27 (1978) (Rehnquist, J., concurring).

The present Massachusetts two-tier system is indistinguishable from that of the Kentucky court system which was challenged on double jeopardy grounds in *Colten* v. *Kentucky*, *supra*, except that to avoid a trial at the first level of the Kentucky system, a defendant had to plead guilty in the inferior court and then request a trial "de novo." *Id.* at 112. A defendant tried in the District and Municipal Courts of Massachusetts may simply obtain a jury trial in the first instance without the stigma of a guilty plea on his record. But neither the Kentucky court system examined in *Colten* v. *Kentucky* nor the present Massachusetts two-tier system imposes two trials on criminal defendants. Thus, no double jeopardy problem is presented. *Colten* v. *Kentucky*, *supra* at 119-120.

The defendants in the present case elected to follow the procedure by which they obtained a bench trial, preserving their right to seek a jury trial if they were dissatisfied with the results of the bench trial. They could have obtained a jury trial in the first instance with a right of appellate review, and no question of double jeopardy would have arisen at the trial level.

The procedure by which a defendant elects a trial by a judge without a jury in the first instance is not casual. Section 26A of G. L. c. 218, inserted by St. 1978, c. 478, § 188, carefully defines the defendant's right to assure that the defendant makes an informed choice. Trials "shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to [§ 27A]." *Id.* No such waiver may be received "unless the defendant is represented by counsel or has filed a written waiver of counsel." *Id.*[13]

[13] Rule 12(A) of the Initial Rules of Criminal Procedure for the District Courts, effective on January 14, 1980, and not applicable to these defend-

A defendant obtains certain distinct advantages in having a bench trial followed by a jury trial, if he wishes. A bench trial serves as a means of discovery and recordation of the prosecution's testimony. Indeed, the judge may find the defendant not guilty. That would end the matter. A bench trial takes less time than a jury trial, offering the defendant a less expensive and less time consuming process. And, if the defendant does not like the result, he may obtain a second chance before a jury or, if he waives a jury, before a second judge, unfettered by the adverse decision previously made. The *Burks* opinion does not alter the statement in *Ludwig* v. *Massachusetts*, 427 U.S. 618, 632 (1976), that "[n]othing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal."

We acknowledge that "where the Double Jeopardy Clause is applicable, its sweep is absolute." *Burks* v. *United States*, 437 U.S. at 11 n.6. There are no equities to be balanced when the clause applies. We think that no double jeopardy is involved, however, when a criminal defendant voluntarily elects to accept the consequences of a procedure such as the optional two-tier system now in effect in the Commonwealth. We concur with the conclusion of the United States Supreme Court "that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978).

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ants because they were arraigned in the Municipal Court of the City of Boston (and before January 14, 1980), provides in part:

> "The oral notice of right to first-instance jury trial shall include a statement to the defendant that if he or she waives this right he or she will receive a trial before a judge and if not satisfied with the results of that trial will be able to appeal for a new trial before a jury."

In light of this opinion, consideration might be given to enlarging the consent form so that the defendant acknowledges that his only avenue of relief from any error in the bench trial is a trial de novo.

In effect, allowing a defendant to have a trial de novo, like requiring "a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction[,] is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Id.* at 91.

We have discussed the double jeopardy issue in terms of the requirements of the Constitution of the United States. No separate argument has been made under the law of the Commonwealth, including the Massachusetts Constitution. The reported question was not limited to the Federal constitutional issue nor expressed solely in terms of constitutional rights. Although this court has never explicitly stated that our Declaration of Rights includes a double jeopardy guarantee (see *Commonwealth* v. *Cepulonis*, 374 Mass. 487, 491-492 [1978][b]), protection against double jeopardy in this Commonwealth has long been part of the common law. See *Gallinaro* v. *Commonwealth*, 362 Mass. 728, 736-737 (1973).

As a matter of common law, we have never held that double jeopardy principles are involved when a criminal defendant, who may have been erroneously convicted at a bench trial, is afforded no appellate or other review of the alleged error but is allowed to seek relief solely by the means of a new trial completely divorced from the record of the prior trial. See *Mann* v. *Commonwealth*, 359 Mass. 661, 664 (1971). The claim of appeal for a second trial has been treated as simply vacating the judgment of the court at the bench trial. See *Enbinder* v. *Commonwealth*, 368 Mass. 214, 217, cert. denied, 423 U.S. 1024 (1975), and cases cited. For the same reasons stated in our discussion on the Constitution of the United States, the circumstances of this case do not offend any provision in the Constitution of the Commonwealth extending jeopardy protection.

We come then to the question, which is rendered largely academic by what we have already decided, namely wheth-

[b] Mass. Adv. Sh. (1978) 477, 482.

er the jury-trial judge could pass on the defendants' motion to dismiss on grounds of double jeopardy. We conclude that the jury trial session is the appropriate forum for consideration of double jeopardy claim asserted after a bench trial. If there is a valid double jeopardy claim, it should be dealt with before, rather than after, the second trial. See note 7 *supra*.

In *Whitmarsh* v. *Commonwealth*, 366 Mass. 212, 216 (1974), appeal dismissed, 421 U.S. 959 (1975), we denied relief under G. L. c. 211, § 3, noting the availability of relief for a double jeopardy claim by means of a motion to dismiss filed in the Superior Court after a District Court bench trial. That opinion considered the procedure for raising double jeopardy issues under the former two-tier system,[14] but the result is no different under the current two-tier system. Rule 13 (c) (2) of the Massachusetts Rules of Criminal Procedure (Mass. [1979]) provides that "[a] defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion." Consequently, the defendants' motion to dismiss properly should have been considered on the merits in the jury trial session. See *A Juvenile* v. *Commonwealth*, Mass. , - (1980);[c] *Connaughton* v. *District Court of Chelsea*, 371 Mass. 301 (1976).

We answer the first reported question in the negative. A defendant is not placed in double jeopardy nerely because his only avenue of relief from a conviction based on insufficient evidence at a voluntarily sought bench trial is a trial de novo. As to the second reported question, the jury-trial judge would have no occasion to consider the sufficiency of the evidence at the bench trial. Because there would be no valid double jeopardy claim, even if the evidence were insufficient to warrant the conviction, the jury-trial judge's

[14] See *Gibson*, *post*, where we discuss the jurisdiction of the Superior Court to consider such a motion under the former two-tier system.

[c] Mass. Adv. Sh. (1980) 1131, 1136-1137.

only option would be to deny such a motion. The case is remanded to the county court for the entry of judgment.

So ordered.

LIACOS, J. (concurring in part and dissenting in part, with whom Abrams, J., joins). Today the court addresses the constitutionality of an aspect of the optional two-tier system of criminal trials described in part in G. L. c. 218, § 26A, inserted by St. 1978, c. 478, § 188. Under this system, a defendant who chooses a bench trial and is convicted on insufficient evidence can be retried de novo to a jury, but he has no other avenue of relief. The majority conclude that this practice does not offend the double jeopardy clause of the Federal Constitution. I respectfully disagree.

The double jeopardy clause creates a constitutional policy against multiple trials of a criminal defendant. See *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). If the prosecution received "one fair opportunity to offer whatever proof it could assemble," but the proof was insufficient, retrial of the defendant would frustrate the purpose of the double jeopardy clause. *Burks* v. *United States*, 437 U.S. 1, 16 (1978). See *Greene* v. *Massey*, 437 U.S. 19 (1978).[1]

The majority declare that "double jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of such conviction by resort to a second-tier trial."

[1] Our previous two-tier system survived a general double jeopardy challenge. *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976). A system somewhat similar to our present one withstood a general challenge in *Colten* v. *Kentucky*, 407 U.S. 104 (1972). However, neither decision addressed the situation in which evidence at the first trial was insufficient. See *Gibson* v. *Commonwealth*, *post* (1980) (Mass. Adv. Sh. [1980] 1933). Both *Ludwig* and *Colten* were decided, moreover, prior to *Burks*, in which the Court first drew a clear distinction between failure of proof and mere trial error, thus overruling a number of earlier cases dealing with double jeopardy claims.

Supra at .[2] *Burks*, however, focused on the nature of the error committed at the first trial, not on acquittal or conviction. Thus, if the error is mere "trial error," which "implies nothing with respect to the guilt or innocence of the defendant," the defendant may be retried. *Burks*, *supra* at 15. If, on the other hand, the government failed to prove its case, retrial is impermissible. *Id.* at 16. The evil at stake is that a defendant against whom the prosecution has not been able to muster even a prima facie case must endure a second trial.

The majority impose a precondition for attachment of the defendants' double jeopardy rights; an appellate determination that the evidence was insufficient to convict him.[3] In so doing, the majority disregard the substantive mandate of *Burks* and fix upon a formal nicety wholly unrelated to the purposes of the double jeopardy clause. If a defendant is convicted on insufficient evidence, he cannot be retried, and it should matter not at all whether an appellate court has confirmed the insufficiency.

The double joepardy clause requires the prosecution to prove its case in one trial. If the prosecution's evidence was so weak that no reasonable trier of fact could conclude that the defendants were guilty beyond a reasonable doubt, this principle applies with special force. The majority choose to

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[2] Mass. Adv. Sh. (1980) 1919.

[3] The majority cite *United States* v. *Scott*, 437 U.S. 82, 88-89 (1978), in support of their distinction. *Supra* at (Mass. Adv. Sh. [1980] at 1921). *Scott* involved an appeal by the government. But, in summary, that discussion merely states: "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, . . . poses no bar to further prosecution on the same charge." *Id.* at 90-91. For a defendant convicted at a first trial, the *Scott* opinion does not abrogate the distinction between evidentiary insufficiency and trial error. Indeed, the careful distinctions drawn in *Scott* as to dismissal of an indictment for reasons other than failure of proof support my view. "In the present case, the District Court's dismissal of the first count of the indictment [after the close of all of the evidence] was based upon a claim of preindictment delay and not on the court's conclusion that the Government had not produced sufficient evidence to establish the guilt of the defendant." *Id.* at 95.

ignore this logic. They would put the defendants here through the "embarrassment, expense and ordeal" of a second trial, and would consign them for a second time to "a continuing state of anxiety and insecurity." *Green* v. *United States, supra* at 187. They refuse to recognize that the double jeopardy clause safeguards against just such mistreatment at the hands of the criminal justice system. After today, the enforceability of the *Burks* right will depend largely upon the sufferance of the Legislature. If the Legislature chooses to provide a criminal defendant with no avenue of relief other than a second trial, the defendant's constitutional right must languish among shadows.

The majority opinion states: "We think that no double jeopardy is involved . . . when a criminal defendant voluntarily elects to accept the consequences of a procedure such as the optional two-tier system now in effect in the Commonwealth." *Supra* at .[b] The majority point out that the defendants, not the Commonwealth, sought a trial de novo and that the Commonwealth simply provided the defendants with no other right to review of the bench trial.

The majority seem to treat a defendant's "voluntary" choice of a bench trial and subsequent "choice" of a trial de novo as a waiver of his double jeopardy rights.[3] But waiver of rights under the double jeopardy clause, like waiver of other constitutional rights, must be knowing and voluntary. *Green* v. *United States, supra* at 191. Even if the Commonwealth is not obliged to furnish a defendant with an avenue of appeal, a defendant choosing the bench trial should

[b] Mass. Adv. Sh. (1980) at 1924.

[3] "We conclude that the defendants' voluntary choice of a bench trial and subsequent choice of a trial de novo create a situation in which double jeopardy is not implicated." *Supra* at (Mass. Adv. Sh. [1980] at 1918). "[D]ouble jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of such conviction by resort to a second-tier trial." *Supra* at (Mass. Adv. Sh. [1980] at 1920-1921). Such language disregards the clear language of *Burks* to the contrary: "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy." *Burks* v. *United States*, 437 U.S. 1, 17 (1978).

understand what he is giving up. Yet the majority seem oblivious to this principle. They make no provision that a defendant understand he is giving up his right not to be tried a second time after being convicted on insufficient evidence.[4] However, if a defendant's choice of a bench trial was not made intelligently, then he did not choose to accept the consequences of his choice. He did not choose to make a second trial his only avenue of relief from a conviction in the first trial. If a defendant's initial choice was not intelligent, it is pointless to say that the Commonwealth does not force him to endure a second trial.

The majority do not suggest that the present two-tier system makes provision for explicit waiver of the right to avoid a second trial after a bench trial conviction on insufficient evidence. Nor does such a waiver appear affirmatively in the report or the record. See *Ciummei* v. *Commonwealth*, Mass. (1979).[5] Therefore, I would answer the first reported question in the affirmative.

On the second question, as if to carry their sophistical exercise a step further, the majority assert that the defendants, in a case such as this one, can raise their double jeopardy claims before the jury-trial judge. But what can be the purpose of this review? According to the majority, the defendants have no double jeopardy claim. Thus, for defendants such as Michael Lydon and Robert McDonald, the procedure before the jury-trial judge can only be charade in which the defendants' motion to dismiss inevitably will be denied. Perhaps the real purpose of this review is to give the jury-trial judge a chance to rule on the sufficiency of the evidence and thus to nullify the inexplicable result reached today.[6]

[4]The majority point out that a defendant who chooses a bench trial may obtain tactical and other advantages. *Supra* at (Mass. Adv. Sh. [1980] at 1923). However, a defendant's choice is not meaningful, in constitutional terms, unless he also understands that he is giving up his constitutional right. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

[5]Mass. Adv. Sh. (1979) 1838.

[6]The majority do not state that this review is available for all double jeopardy claims arising from the bench trial, or for claims unlike Lydon's and McDonald's.

Because I would answer the first reported question in the affirmative, I concur with the majority's answer to the second question. The jury trial session is the proper forum for a defendant to raise a double jeopardy claim arising at his bench trial.

Office-Supreme Court, U.S.
FILED
SEP 1 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1479.

In the
Supreme Court of the United States.

OCTOBER TERM, 1983.

JUSTICES OF THE BOSTON MUNICIPAL COURT,
PETITIONERS,

v.

MICHAEL LYDON,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

JOINT APPENDIX.

BARBARA A.H. SMITH,
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(617) 353-5011
Attorney for Respondent

PETITION FOR CERTIORARI FILED MARCH 4, 1983.
CERTIORARI GRANTED JUNE 27, 1983.

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Commonwealth vs. alias Michael O'Toole
True name is Michael Lydon 792897
Attorney: Bonnie Hannon Filed in the Municipal Court
Address: Mass. Def. - 120 Boylston St. of the City of
Boston, Mass. Boston November 20, 1979
Complaint: Possession of Burglars Tools
John J. Craven Jr., Clerk

Date of Offense: October 31, 1979
District Court: BMC Justice: Glynn, J.
District Court Plea: Not Guilty Finding: Guilty
Disposition: H of C for two years
$500. to Nov. 29, 1979 own recog
Complainants: James Riley, Dist. 4
A TRUE COPY ATTEST

/s/_____
Francis M. Sheils
Justice: CLERK MAGISTRATE
Date Assigned Trial by Jury: Nov. 29, 1979

1979

Nov. 29 Attorney Hannon. PLEADS NOT GUILTY. $500. to Jan. 28 own recog. Glynn, J.

1980

Jan. 18 Motions received Dec. 20 filed under Michael Lydon 1. Motion for revision and revocation of sentence persuant to Mass. Correctional proc. rule 29. Motion withdrawn. 2. Memorandum in support of motion for revision and revocation of sentence.

Jan. 24 1980 Motions received and filed. (1) For Continuance (2) For leave to file late. (3) To Dismiss.

1980

Jan. 25	Continued to Feb. 5 Silverman, J.
Feb. 5	Deft. in court. Atty. Bonnie Hannon appears. Motion to dismiss denied Silverman, J. Proceedings ordered stayed until Feb. 7, 1980 at 10 A.M. by the S.J.C. Pino, J.
Feb. 7	Order of Justice Wilkins of the S.J.C. received and filed. That said stay of proceedings remain in effect until further order of this court.

1981

May 14	Judgement of the Supreme Judicial Court received and filed. The defendant's Constitutional challenge concerning double jeopardy fails and the Jury Session judge should proceed with Trial DeNovo since the defendant's request for Jury Trial vacated the judgement of the bench trial. Liasos, J.
July 1	D.N.I.C. Cont. to Aug. 11 Status. Hamlin, J.
Aug. 11	Atty. Hannon appears. Continued to Sept. 15 for Status only. Burnham, J.
Sept. 15	D.N.I.C. Cont. to Oct. 16 for Status only. Atty. Hannon appears. Glynn, J.
Sept. 14	Order from the U.S. District Court by U.S. District Judge Garrity for responsible pleading. That the respondents file answers or other responsive pleadings on or before Sept. 30, 1981
Oct. 13	D.N.I.C. Atty. Nilsen. Continued to Nov. 20 for Status. Pino, J.
Nov. 20	D.N.I.C. Atty. Nilsen appears. Cont. to Dec. 18 for Status. Cratsley, J.
Dec. 18	D.N.I.C. Atty. Nilsen. Cont. to Jan. 18 Status. Umana, J.
Jan. 18	Atty. Nilsen appears. Cont. to March 16, Status. Burnham, J.

1982

March 16	D.N.I.C. Atty. Rossman. Cont. to April 16. Cratsley, J.
April 16	Atty. Rossman. Cont. to April 20. Status Cratsley, J.
April 20	Atty. Rossman. Cont. to April 26. Status Cratsley, J.
April 26	D.N.I.C. Atty. Rossman appears. Case cont. to June 28. Motion to stay execution of the order and judgement of the District Court pending appeal. Cratsley, J.
June 28	D.N.I.C. Cont. to July 6 Status. No Atty. Burnham, J.
July 6	D.N.I.C. Cont. to Aug. 10. Grabau, J.
Aug. 10	D.N.I.C. Atty. Rossman. Cont. to Sept. 24 Status. Cratsley, J.
Sept. 24	D.N.I.C. Atty. Rossman. Cont. to Dec. 2 Status. Grabau, J.
Dec. 2	D.N.I.C. Atty. Nilson cont. to Dec. 30 Status. Donovan, J.
Dec. 30	D.N.I.C. Atty. Roseman. Cont. to Jan. 31, Donovan, J.

1983

May 3	Deft's Motion to dismiss memo in support, Appendix A and Appendix B and cert. of service received and filed. Motion to be heard June 8, 1983
June 8	D.N.I.C. Atty. Rossman. Deft's motion to dismiss taken under advisement Grabau. J
June 10	The Court declines to act on defendant's Motion to Dismiss. Notice forwarded to A.D.A. and Atty. Rossman Grabau. J.

A TRUE COPY ATTEST

/s/_____

Francis M. Sheils Clerk Magistrate

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SUFFOLK COUNTY NO. 80-52 Civil

COMMONWEALTH vs. MICHAEL LYDON and ROBERT McDONALD

Counsel for Defendant:
Bonnie J. Hannon
Student Attorney under Rule 3:11
Boston University Defender Program
755 Commonwealth Avenue
Boston, Massachusetts

Feb. 5	Motion for Stay of Proceedings filed. Complaint for Relief pursuant to G. L., C. 211, s.3 and 4A filed. Order of Court, as on file. Motion for Stay of Proceedings filed.
Feb. 6	Appearance of Bonnie J. Hannon, Student Attorney under Rule 3:11, Boston University Defenders Program, Room 600, Boston, Ma 482-6212m Ext. 165, for Michael Lydon filed. Appearance of Eva S. Nilsen, Boston University Defender Program, 120 Boylston Street, Boston. 482-6212, for Michael Lydon, filed. Appearance of Kenneth D'Arcy, 119 Huron Avenue, Cambridge, Ma 354-2679 for Robert McDonald filed. Motion for Preliminary Injunction to Further the Stay filed. Order extending Stay as on file.
Feb. 29	Stipulation of Agreement filed.
March 7	Reservation and Report of Questions arising in the Plaintiffs' Petition for relief under G. L. C. 211, sec. 3, as on file. (Wilkins, J.)

March 11 Notice of assembly of record on appeal sent to Bonnie Hannon, Boston University Defender Program, 120 Boylston St., Boston, 02116, and Eva S. Nilsen, Boston University Defender Program, and Kenneth D'Arcy, Esq., 119 Huron Ave., Cambridge, for the defendants; and to Michael Traft and Arthur Tiernan, Assistant District Attorneys, New Court House, Boston, for the Commonwealth, by letters dated and mailed this day.

April 3 Designation of the Record filed.

Oct. 8 Order (Full Court) "that the Motion heretofore filed to stay the issuance of the rescript, in each of the following cases is allowed:
SJC-2107 *Michael Lydon & Another* v. *Commonwealth*
SJC-2121 *A Juvenile* v. *Commonwealth*" filed.

1981

March 20 "The case is remanded to the county court for the entry of judgment."
— per rescript as on file.

May 12 Motion for Entry of Judgment filed. (Allowed, Wilkins, J., 5/12/81)
Judgment as on file. (Liacos, J.) [ORDERED and ADJUDGED, That the defendant's constitutional challenge concerning double jeopardy fails, and the jury session judge should proceed with trial *de novo* since the defendant's request for jury trial vacates the judgment of the bench trial.]

A true copy;
Attest:
June 30, 1983

/s/_____
Paul J. Swartz
Assistant Clerk,
Supreme Judicial Court

Supreme Judicial Court
for the Commonwealth of Massachusetts
S.J.C. 2107

Rescript Title: MICHAEL LYDON & another vs. COMMONWEALTH

COMMONWEALTH vs. MICHAEL LYDON & another

Direct Entry
Trial Court: Suffolk
S.J.C.
No.: 80-52 CIVIL
Nature of Case: Ch. 211, §§ 3 and 4A
Appeal By: Reservation and Report

Counsel for Plaintiff — Brief Due: To be determined
Michael J. Traft, A.D.A.
Arthur Tiernan, A.D.A.
New Court House, 6th Floor
Boston, MA 02108
Tel:
Counsel for Defendant: Brief Due: To be determined

For Lydon:
Boston University Defend. Program
Eva S. Nilson
120 Boylston Street
Boston, MA 02116
Tel: 482-6212
Bonnie Hannon, Law Student (home: 631-0293)

For McDonald:
Kenneth D'Arcy
119 Huron Avenue
Cambridge, MA
Tel: 354-2679

Argued: 5-6-80 Quorum: L, K, CJ, W, A, Decided: 8/22/80

3-12-80	Entered.
4-5-80	Motion for Leave to File Late filed by Eva S. Nilson, counsel for the defendant Lydon and Kenneth D'Arcy, counsel for the defendant McDonald. ALLOWED. Appellants due: April 8, 1980. Appellee due: April 29, 1980.
4-8-80	Service of Brief and separate Appendix for Defendants/Appellants by Eva Nilson of Boston University Defenders Program, 765 Commonwealth Avenue, Boston 02215, Tel: 353-3131, and Kenneth D'Arcy, 119 Huron Avenue, Cambridge, MA.
4-11-80	Service of Amicus Curiae Brief by Mass. Defenders Committee (Richard J. Hayes, William J. Leahy, Martin R. Rosenthal, Brownlow M. Speer).
4-4-80	Motion of Mass. Defenders Committee for Leave to File Amicus Curiae Brief -and- Motion to File Amicus Curiae Brief Late, by William J. Leahy of M.D.C.
4-30-80	Motion of Commonwealth to File Joint Brief (with -2121). ALLOWED 4-30-80 (Wilkins, J.)
4-30-80	Service of Joint Brief (with SJC-2121) for Commonwealth by Michael J. Traft, A.D.A., New Court House, Boston 02108, Tel: 725-8600.
5-5-80	Service of Reply Brief for the Appellants filed by Bonnie Hannon, Law Student, Boston University Defenders Program, 765 Commonwealth Ave. Boston 02215 (353-3131). Eva Nilsen, Esquire, Boston University Defenders Program. On Brief David Rossman, Director, Boston University Program

8/22/80	The case is remanded to the county court for the entry of judgment. Rescript August 22, 1980. Reasons as on file. Notice to counsel.
9/10/80	Motion For Stay Of Rescript filed by Eva S. Nilsen of Boston Univ. Defenders Program on behalf of Michael Lydon.
9-16-80	Commonwealth's Answer to Petitioner's Motions for Stay of the Rescript filed by Michael J. Traft, ADA
9/17/80	Order of Court staying issuance of rescript. Notice to counsel, and to Clerk for Supreme Judicial Court for the County of Suffolk.
3/18/81	Motion to Revoke Stay of Rescript filed by the Commonwealth
3/20/81	Motion to Revoke Stay of Rescript ALLOWED. Rescript issued.

A TRUE COPY.

ATTEST: /s/_____

Patrick J. Hurley, Clerk
Supreme Judicial Court for the Commonwealth

JUNE 30, 1983

Plaintiffs

LYDON, Michael

DEFENDANTS

THE JUSTICES OF THE BOSTON MUNICIPAL COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS, and
FRANCIS X. BELLOTT, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS

Closed — 4-13-82

GARRITY, D.J.
ON APPEAL

CAUSE
(cite the U.S. civil statute under which the case is filed and write a brief statement of cause)
HABEAS CORPUS: §2254

ATTORNEYS

David Rossman
Boston University Law School
765 Commonwealth Avenue
Boston, Massachusetts 02215
353-3131

Barbara A.H. Smith, Esq.
Asst. Atty. General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, MA 02108
727-2240

1981		
Sept		Petition for writ of habeas corpus rec'd for filing, w/mtn for leave to proceed in forma pauperis and affidavit of Michael Lydon in support thereof.
9		DeGIACOMO, M. — re: mtn to proceed in forma pauperis . . . It is ORDERED: that the pltf in the above-entitled proceeding be and he hereby is permitted to prosecute said proceeding to conclusion without prepayment of fees or costs or security therefor. (cc/cl)
10		PETITION FOR WRIT OF HABEAS CORPUS, FILED.
14		GARRITY, J. — ORDER FOR RESPONSIVE PLEADING, ENTERED . . . respondents to file ans. or responsive pleadings by 9/30/81. (cc/cl) Mailed cert. mail #P30 8655446 to Atty. General; mailed #P30 8655447 to Justices of Boston Municipal Court.
29	2	Answer of Respondents, FILED (c/s)
	3	D's Motion to Dismiss, FILED (c/s)
6		GARRITY, J. — NOTICE OF HEARING, Hearing on Motion to Dismiss (#3) scheduled for 11/4/81, if denied, petition for habeas corpus will be heard (3:00 p.m.) PROCEDURAL ORDER: Parties shall file briefs on or before 10/30/81 (cc/cl)
30	4	Memo in support of mtn to dismiss, FILED (c/s)
30	5	P's memo in opposition to mtn to dismiss, FILED c/s
Nov.	4	GARRITY, J. — After hearing on D's motion to dismiss and P's petition for habeas corpus, matter TUA.
13		Lett to Judge Garrity from Atty Rossman w/copies of complaint and mtn for stay that pet. filed before Single Justice; stip. by parties re: trans. of orig. trial; and opinion in Comm. v. Coppola. FILED cc/cl

1982	
Apr. 13	GARRITY, J. — Memorandum and Order on Habeas Corpus Petition, filed; (denying respondent's motion to dismiss and granting petition for writ of habeas corpus). (cc/cl — Full publication)
13	GARRITY, J. (sm) — JUDGMENT, ENTERED (cc/cl).
21	D's Notice of Appeal, FILED. (c/s) F.F.pd. D's Motion to Stay Execution of the Order and Judgment of the District Court Pending Appeal, FILED. (c/s)
23	GARRITY, J. re: D's Motion to Stay Execution of the Order and Judgment of the District Court Pending Appeal . . . ALLOWED AND SO ORDERED, FILED. (cc/cl)
May 4	Certified copy of docket & original pleadings forwarded to court of appeals.
7	Ltr. to J. Garrity from Robert W. Hagopian enclosing Opinion in 80-21 FILED.

Civil Docket Continuation Sheet

81-2311-G

Plaintiff — MICHAEL LYDON

Defendant — JUSTICES OF THE BMC ETC

1982

Dec 30 Opinion received from the Court of Appeals entered . . . affirmed.

GENERAL DOCKET

United States Court of Appeals

for the First Circuit

Case No. 821376

MICHAEL LYDON

V.

JUSTICES OF THE BOSTON MUNICIPAL COURT

1982

April 27	Copy of notice of appeal and district court docket entries, received and filed. Case docketed and notices mailed. (as)
May 3	Appearance of David Rossman, Esquire for appellee received and filed. (1b)
May 4	Appearance of Barbara A.H. Smith, Esquire for appellants received and filed. (1b)
May 4	Record on appeal consisting of one volume received and filed. Notices mailed. (1b)
May 5	Docketing statement received and filed. (1b)
May 11	Designation of statement of issues received and filed. (1b)
May 11	Motion filed. Order (Campbell, J) granting leave to parties to proceed on the original record, etc., without reproduction in appendix form. Notices mailed. (1b)
May 27	Motion filed. Order (Campbell, J) enlarging time for appellant to file his brief and appendix to and including July 8, 1982. This case is to remain of the September, 1982 session. Notices mailed. (1b)
July 2	Motion filed. Order (Breyer, J.) enlarging time for the appellant to file their brief to and including July 14, 1982. Notices mailed.

1982	
July 13	Brief for appellant received and filed. Notices mailed. (lb)
July 15	Motion of Newman Flanagan, et al for leave to file one day late a Brief amici curiae received and filed; Motion of Newman Flanagan, et al for leave to brief amici curiae received and filed. (lb)
Aug. 3	Notice of consent to filing of amicus curiae brief received and filed. Brief of the Massachusetts Defenders Committee as Amicus Curiae received and filed. (jmv)
Aug. 3	Brief for the appellee, petitioner received and filed. (lb)
August 4	Order (Bownes, J.) granting leave to Newman Flanagan et al. to file a brief Amicu Curiae today. Brief of Newman Flanagan et al. as Amici Curiae received and filed. Notices mailed. (cb)
Aug. 23	Assigned for hearing at the September, 1982, session. Notices mailed. (cb)
Sept. 13	Heard by Davis, Campbell & Breyer, J.J. [1am]
Dec. 30	JUDGMENT: The judgment of the district court is affirmed. Notices mailed. Opinion of the court by Breyer, J., dissenting opinion by Campbell, J. (jmo)
1983	
Jan 3	Motion To Stay Mandate, received and filed. (cd)
Jan. 4	Order: (Breyer, J.) staying mandate pending an application to the Supreme Court of the United States for a writ of certiorari, the same to be filed by March 21, 1983. Notices mailed. (ar)
Mar. 21	Petition for certiorari filed Supreme Court, (No. 82-1479) March 4, 1983. (ar)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 80-52

MICHAEL LYDON and ROBERT McDONALD
V.
COMMONWEALTH OF MASSACHUSETTS

RESERVATION AND REPORT OF
QUESTIONS ARISING IN THE PLAINTIFFS' PETITION
FOR RELIEF UNDER G. L. c. 211, § 3

The plaintiffs, who for convenience will be called the defendants, were tried and convicted at a bench trial in the Municipal Court of the City of Boston for possession of burglarious instruments (G. L. c. 266, § 49). They seek dismissal of their convictions under G. L. c. 211, § 3.

The defendants rest their argument on the ground that, because the evidence at their bench trial did not warrant a finding of guilt of the crime for which they were charged, it would be a violation of the constitutional principles of double jeopardy to require them to undergo a jury trial, a trial which they have demanded, as is their right. It seems to be an inadequate answer to say that the defendants have demanded a jury trial and have, therefore, waived their right to press their double jeopardy argument. The issue arises because of the decision of the Supreme Court of the United States in *Burks* v. *United States*, 437 U.S. 1 (1978). The problem exists under the procedures developed by the Court Reorganization Act, involving the right to a bench trial in a District/Municipal Court followed by the right to have a de novo jury trial in the

same court. However, the situation was not necessarily any different, as far as the issue presented is concerned, under the former practice of a trial before a judge in the District/Municipal Court with the right to have a de novo jury trial in the Superior Court. The basic issue is whether the principles of the *Burks* case should be extended to the procedural circumstances which exist in this Commonwealth. Further, there is the question whether an allegedly aggrieved defendant may or must present the challenge to the judge in the jury trial session. It is assumed that such defendant properly challenged the sufficiency of the evidence at the bench trial. That appears to be the situation in the case before me. In previous situations in which this issue has come before me as a Single Justice, I concluded that the evidence at the bench trial was sufficient to warrant a guilty finding and thus denied relief under G. L. c. 211, § 3, on that ground without dealing with the propriety of granting relief under G. L. c. 211, § 3. See, e.g., *Coppola* v. *Commonwealth*, 79-363 Civ. Obviously, if every challenge to the sufficiency of the evidence at a bench trial could be raised prior to the jury trial only in the Single Justice Session, the county court might be flooded with cases of this character. As will be seen, I am of the view that the evidence was not sufficient to warrant guilty findings. Consequently, the appropriateness of relief under G. L. c. 211, § 3, in a procedural sense, is squarely presented in this case. I turn then to the proceedings in the Boston Municipal Court in the case before me. For the purposes of considering the issues reported, one need not read this next section and may turn directly to the conclusion.

The Challenge on the Merits

The complaint alleged that the defendants knowingly had possession of implements adapted and designed for forcing

and breaking open a depository "in order to steal therefrom, such money or other property as might be found therein." The Commonwealth concedes that the evidence presented was insufficient to warrant a finding of guilty on the charges as set forth in the complaint. Thus, on the question of the sufficiency of the evidence, we deal with the Commonwealth's contentions that (1) the complaint can be read together with the application for the complaint and (2) the complaint can be amended after the Commonwealth has presented its case so that the evidence would support a conviction of the charge in the complaint, as amended.

A criminal complaint can be amended on the judge's own motion or on written motion by either party "if such amendment would not prejudice the defendant or the Commonwealth." Mass. R. Crim. P. 4(d). The court may even allow an amendment after the presentation of evidence that does not conform with the original indictment or complaint. *Commonwealth* v. *Binkiewicz*, 342 Mass. 740, 747-749 (1961). But any such amendment must be only as to matters of form and not as to matters of substance. *Commonwealth* v. *Snow*, 269 Mass. 598, 606 (1930). The test to determine whether the change in the complaint is material is whether judgment of conviction or acquittal on the complaint as drawn would be a bar to a new complaint drawn in the form in which it stood after the amendment. *Id.* at 609-610. *Commonwealth* v. *Binkiewicz*, *supra* at 748. If not, the amendment would be one of substance because the amended complaint would be charging the defendant with a different crime. Such a substantive amendment clearly would be prejudicial to the defendant.

In the present case, a judgment of conviction or acquittal on the complaint as originally drawn would not be a bar to a new complaint written to include the amendment. See *Salemme* v. *Commonwealth* 370 Mass. 421, 423, (1976). Thus, the amendment is one of substance and cannot be allowed.

The original complaint charged that the defendants possessed burglarious implements for the purpose of breaking into a depository (here, we assume an automobile qualifies as a "depository") and stealing things contained therein. G. L. c. 266, § 49. The amended complaint would charge that the defendants possessed burglarious tools with the intent to break into an automobile for the purpose of putting the vehicle to some unauthorized use. See G. L. c. 90, § 24 (2) (a). These are clearly two separate crimes, because each offense includes an element that is not an element of the other offense. One element of the crime charged in the original complaint would be the specific intent to steal items from inside the automobile. Such intent would not have to be shown in order to prove an intention to make an unauthorized use. Conversely, the crime of unauthorized use includes the element of the purpose to make an unauthorized use of the vehicle. *Commonwealth* v. *Ciannino*, 371 Mass. 700, 703 (1977). Although a showing of unauthorized taking is required to prove the crime of larceny of a motor vehicle (*id.*), such showing is not required to prove larceny of articles contained within the motor vehicle. Thus, the case of *Costarelli* v. *Commonwealth*, Mass. Adv. Sh. (1978) 734, is distinguishable. Possession of the tools to be used to steal from within the automobile is a different crime from possession of the tools for the purpose of committing some other crime, such as unauthorized use of the automobile.

The words that the Commonwealth seeks to add to the complaint are themselves an indication that the Commonwealth's amendment would charge the defendant with a different offense. By requesting the addition of the words "or any other crime" to the complaint, the Commonwealth seeks to charge the defendant with the intention to commit some *other* crime.

The Commonwealth argues, alternatively, that the complaint can be read together with the application for the complaint in order to cure any defect in the complaint. The Com-

monwealth claims that because the application for the complaint is a part of the record, the defendants had adequate notice of the charges in the application and would not be prejudiced by having to defend against them. The Commonwealth cites no authority for the proposition that a complaint may be broadened by consideration of the application for the complaint. The charges in the complaint must stand alone unless the complaint can be amended without prejudice to either party. "[I]t is the substance of the complaint that governs, and that is determined by the language in the body of the complaint itself." *Commonwealth* v. *McClaine*, 367 Mass. 559, 560 (1975). The offense must not only be proved as charged, but also it must be charged as proved. *Commonwealth* v. *Ancillo*, 350 Mass. 427, 430 (1966). Thus, the material variance between the proof at trial and the charges in the complaint entitled the defendants to a finding of not guilty. *Commonwealth* v. *Armenia*, 4 Mass. App. Ct. 33, 38-39 (1976).

Conclusion

I would not exercise my discretion at this time under G. L. c. 211, § 3, to grant relief to the defendants if (1) there were no double jeopardy violation in requiring the defendants to go through a jury trial, preserving their objections for consideration on appeal from any conviction, or (2), assuming a retrial would deny double jeopardy rights, if there were a procedural remedy available to the defendants (other than a writ of error or G. L. c. 211, § 3, relief) to be pursued before the jury trial was held.

I do not report my ruling concerning the insufficiency of the evidence, but I do report these questions:

1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him without waiving his rights, when the evidence at the bench trial was insufficient to warrant a conviction?

2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial has denied an appropriate request for a ruling that the evidence at the bench trial was insufficient?

/s/_____
Herbert P. Wilkins
Associate Justice

March 7, 1980

A true copy.
Attest
October 8, 1980

/s/_____
John E. Powers
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MICHAEL LYDON, Petitioner VS. THE JUSTICES OF THE BOSTON MUNICIPAL COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS, Respondents AND FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS, Respondent	No. 81-2311-G PETITION FOR WRIT OF HABEAS CORPUS

PRELIMINARY STATEMENT

This is a petition for a Writ of Habeas Corpus directed to the Justices of the Boston Municipal Court, to require them to release petitioner from the custody which they exercise holding him for a trial which would violate his right under the Fifth and Fourteenth Amendment to the United States Constitution to be free from double jeopardy.

Petitioner bases his claim on the holding of the United States Supreme Court in Burks v. United States, 437 U.S. 1 (1978) and Greene v. Massey, 437 U.S. 19 (1978), that the Double Jeopardy Clause prevents a state from retrying a defendant who challenges a conviction and establishes that it was based upon insufficient evidence to meet the state's burden of proving the defendant guilty beyond a reasonable doubt.

Petitioner was tried and convicted in the first tier of Massachusetts' de novo system in a trial where, as the Commonwealth conceded before the state courts, the evidence was not sufficient as a matter of law. The petitioner exercised the only option available to him under state law to obtain relief from his conviction, and appealed for a trial de novo. He raised his claim that the Double Jeopardy Clause barred any further trial in the state courts, and the Supreme Judicial Court ultimately rejected it. Lydon v. Commonwealth, 409 N.E.2d 745 (1980).

JURISDICTION

1. This Court has jurisdiction pursuant to Title 28 United States Code, Section 2241, *et seq.*, and Section 2254.

PETITIONER

2. Petitioner, Michael Lydon, is a defendant in criminal case number 792897 pending in the jury session of the Boston Municipal Court. He has been released in personal recognizance in the amount of $500 to ensure his appearance for trial before that Court.

RESPONDENTS

3. The Respondents, Justices of the Boston Municipal Court, have jurisdiction over the trial of Petitioner's case in the jury session of that court. In addition, by virtue of their action in releasing Petitioner on his own recognizance and their authority to impose criminal penalties for his failure to appear, M.G.L. c. 276, § 82A, the Respondents are Petitioner's custodians within the meaning of 28 U.S.C. § 2241(c)(3).
4. Respondent Francis X. Bellotti is the Attorney General of the Commonwealth of Massachusetts.

CUSTODY

5. Petitioner appeared in the jury session of the Boston Municipal Court on November 29, 1979, to answer to complaint number 792897, (Appendix A), which is the complaint that Petitioner alleges is barred by the Double Jeopardy Clause.
6. Petitioner was released on that date in his own recognizance, without surety, in the amount of $500, pursuant to Massachusetts General Laws Ch. 276, § 58, to ensure his further appearance. (See docket sheet, Appendix B).
7. Petitioner has continued to be subject to the original conditions of his release on personal recognizance, M.G.L. c. 276, §§ 65, 71.
8. Petitioner is currently in custody of the Respondents by virtue of the conditions placed upon his personal recognizance, and the criminal penalties he would be subject to for violation for those conditions. M.G.L., c. 276, § 82A.

EXHAUSTION OF STATE REMEDIES

9. Petitioner argued to the judge at his original trial, that the evidence the Commonwealth presented was insufficient. (See transcript, p. 10, Appendix C).
10. Petitioner presented his claim that the Double Jeopardy Clause prohibits his trial in the jury session of the Boston Municipal Court to a Single Justice of the Supreme Judicial Court, who reserved ruling on it and reported it to the full bench of that Court. (See Appendix D).
11. The full bench of the Supreme Judicial Court, after briefing and argument, rejected the merits of Petitioner's claim. (See opinion attached as Appendix E).
12. The judgment of the Supreme Judicial Court, (Appendix F) orders the Respondents to proceed with Petitioner's trial.
13. Petitioner has exhausted his remedies in state court by virtue of the foregoing.

SUBSTANTIVE ALLEGATIONS

14. The restraint on Petitioner's custody that the Respondents have imposed is unconstitutional in that further prosecution of the complaint pending in the Boston Municipal Court will place Petitioner twice in jeopardy in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution. The facts and circumstances which constitute the denial of Petitioner's rights are as follows:
15. Petitioner was charged with a criminal complaint, (See Appendix A), in the Boston Municipal Court

alleging that he violated Massachusetts General Laws Ch. 266, § 49 by possessing tools designed to break into a depository with the intent to steal goods contained inside it.

16. Without waiving his right to the protection of the requirement that the Commonwealth present proof of each element of the crime beyond a reasonable doubt, or of his right to be free from being placed twice in jeopardy, the defendant chose a trial in the bench session of the Boston Municipal Court subject to a trial de novo pursuant to Massachusetts General Laws Ch. 218 § 26A.
17. Petitioner was tried on this complaint in the bench session of the Boston Municipal Court, on November 9, 1979.
18. Counsel for Petitioner raised the issue at the bench trial, that the Petitioner was entitled to an acquittal because the Commonwealth offered no evidence of one of the elements of the crime: the intent to steal items from the depository. (See transcript, Appendix C).
19. The Court convicted Petitioner and sentenced him to two years in the House of Correction, whereupon Petitioner, without waiving his right to be free from being placed twice in jeopardy, exercised his right to a trial de novo in the jury session of the Boston Municipal Court.
20. Petitioner filed a Motion to Dismiss the complaint in the jury session, on the ground that the Double Jeopardy Clause barred any further trial because the original conviction was based on insufficient evidence as a matter of law. The Motion to Dismiss was denied without a hearing.

21. Petitioner sought relief from a Single Justice of the Supreme Judicial Court, under the general power of superintendence given it by Massachusetts General Laws, Ch. 211, § 3. The Single Justice stayed Petitioner's trial in the jury session until resolution of the issue he raised.
22. Before the Single Justice the Commonwealth conceded that the evidence introduced at Petitioner's trial was insufficient to warrant a finding of guilty on the charges as set forth in the complaint. (See Appendix D, at 3).
23. The Single Justice ruled that the evidence at Petitioner's original trial was insufficient as a matter of law to sustain a conviction. (See Appendix D, at 7).
24. The Single Justice, however, reserved ruling on the merits of Petitioner's claim that the Double Jeopardy Clause barred a trial de novo, and reported the question to the full bench of the Supreme Judicial Court.
25. The Supreme Judicial Court held, in a 5-2 opinion issued on August 22, 1980, that the Double Jeopardy Clause did not bar Petitioner's retrial, even assuming that the evidence at his original trial was not sufficient to meet the Commonwealth's burden of presenting proof beyond a reasonable doubt. (See Appendix E).
26. Petitioner sought review by a Writ of Certiorari in the United States Supreme Court, which was denied on December 15, 1980.
27. The judgment of the Supreme Judicial Court issued on May 12, 1981, ordering the jury session judge in the Boston Municipal Court to proceed with Petitioner's trial de novo.
28. Petitioner has been ordered to appear in the jury session of the Boston Municipal Court on September 15,

1981, to report on the status of both the criminal case in that court, and this habeas corpus action.

29. Unless this Court grants relief, Petitioner will thus be required to stand twice in jeopardy for the same offense, and the Commonwealth will have a second chance to present evidence establishing his guilt although it failed to do so at his first trial.
30. Unless this Court grants relief, Petitioner will suffer irreparable injury because the right he asserts depends on his not having to undergo a second trial, quite apart from whatever the result of that trial may be.
31. Petitioner has filed no previous petition.

RELIEF REQUESTED

32. Petitioner prays that this Honorable Court:
    (a) Issue a Writ of Habeas Corpus in his behalf directed to the Respondents;
    (b) Order that the Respondents be required to appear and answer the allegations of this petition;
    (c) Order Respondents to stay any trial of Petitioner pending final determination of this petition;
    (d) After full and complete hearing, order that petitioner be released of his unconstitutional restraint; and,
    (e) Grant whatever further relief the Court may deem just and appropriate.

I declare under penalty of perjury that the foregoing is true and correct.

/s/_____
MICHAEL LYDON

Executed on Sept. 9, 1981

Attorney for Petitioner:
David Rossman
Director, Boston University Defender Program
Boston University School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-3131

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

MICHAEL LYDON, Petitioner	
v.	
JUSTICES OF THE BOSTON MUNICIPAL COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS, Respondents	NO. 81-2311-G

ANSWER

Now come the respondents and answer the above entitled petition for writ of habeas corpus as follows:

1. Paragraph numbered one does not admit of a responsive pleading.

2. Respondents admit the factual allegations contained in paragraph two of the petition.

3. Respondents admit the factual allegations contained in the first sentence of paragraph three. The remainder of paragraph three does not contain factual allegations which admit of a responsive pleading.

4. Respondents admit the factual allegations contained in paragraph four of the petition.

5. Respondents admit so much of the allegations contained in paragraph five as allege that petitioner appeared in the jury session of the Boston Municipal Court on November 29, 1979, to answer to Complaint Number 792897.

6. Respondents admit the factual allegations contained in paragraph six of the petition.

7. Respondents admit the factual allegations contained in paragraph seven of the petition.

8. Respondents admit the factual allegations, but not the legal conclusions, contained in paragraph eight of the petition.

9. Respondents admit the factual allegations contained in paragraph nine of the petition.

10. Respondents admit the factual allegations contained in paragraph ten of the petition.

11. Respondents admit so much of the factual allegations contained in paragraph eleven of the petition as allege the full bench rejected his claim.

12. Respondents admit the factual allegations contained in paragraph twelve of the petition.

13. Respondents deny the factual allegations contained in paragraph thirteen of the petition.

14. Respondents deny the factual allegations contained in paragraph fourteen of the petition.

15. Respondents admit the factual allegations contained in paragraph fifteen of the petition.

16. Respondents admit so much of the factual allegations contained in paragraph sixteen of the petition as allege petitioner chose a bench trial in the Boston Municipal Court.

17. Respondents admit the factual allegations contained in paragraph seventeen of the petition.

18. Respondents admit the factual allegations contained in paragraph eighteen of the petition.

19. Respondents admit so much of the factual allegations contained in paragraph nineteen of the petition as allege that

petitioner was convicted and sentenced and exercised his right to a trial de novo in the jury session of the Boston Municipal Court.

20. Respondents admit the factual allegations contained in paragraph twenty of the petition.

21. Respondents admit the factual allegations contained in paragraph twenty-one of the petition.

22. Respondents deny the factual allegations contained in paragraph twenty-two of the petition.

23. Respondents deny the factual allegations contained in paragraph twenty-three of the petition.

24. Respondents admit the factual allegations contained in paragraph twenty-four of the petition.

25. Respondents admit so much of the factual allegations contained in paragraph twenty-five of the petition as allege that the Supreme Judicial Court held that the Double Jeopardy Clause did not bar petitioner's retrial and further states that the opinion of the Court speaks for itself.

26. Respondents admit the factual allegations contained in paragraph twenty-six of the petition.

27. Respondents admit the factual allegations contained in paragraph twenty-seven of the petition.

28. Respondents admit the factual allegations contained in paragraph twenty-eight of the petition.

29. The remaining paragraphs of said Complaint do not contain factual allegations which admit of a responsive pleading.

Respectfully submitted,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BY: /s/_____

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, MA 02108
727-2240

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

MICHAEL LYDON, Petitioner v. JUSTICES OF THE BOSTON MUNICIPAL COURT DEPARTMENT OF THE TRIAL COURT OF MASSACHUSETTS, Respondents	NO. 81-2311-G

MOTION TO DISMISS

Now come the respondents and move to dismiss the above entitled petition for writ of habeas corpus for the reasons that:

1. petitioner has failed to exhaust state remedies in that he has not proceeded to trial de novo in the jury session which he claimed as of right.

2. the petition fails to state a claim upon which relief may be granted.

3. this Court lacks jurisdiction under both 28 U.S.C. § 2241 and § 2254 for the reason that petitioner is not "in custody

under or by color of the authority of the United States . . ." 28 U.S.C. § 2241(c)(1); nor is he in "custody pursuant to the judgment of a State Court. . ." 28 U.S.C. § 2254(a).

Respectfully submitted,
FRANCIS X. BELLOTTI
ATTORNEY GENERAL

BY: /s/_____

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division
One Ashburton Place
Boston, MA 02108
727-2240

CERTIFICATE OF SERVICE

I, BARBARA A.H. SMITH, Assistant Attorney General, hereby certify that on this 29th day of September, 1981; I gave notice in writing to the petitioner of the filing of the foregoing Answer and Motion to Dismiss, by mailing, postage prepaid and first class mail, copies of same to his attorney, David Rossman, Director, Boston University Defender Program, Boston University School of Law, 765 Commonwealth Ave., Boston, MA 02215.

/s/ _____

BARBARA A.H. SMITH
Assistant Attorney General
Chief, Criminal Appellate Division

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

MICHAEL LYDON, Plaintiff	)	
vs.	)	
JUSTICES OF THE BOSTON MUNICIPAL COURT DEPARTMENT MUNICIPAL COURT, et al. Defendants	)	Civil Action No. 81-2311-G

JUDGMENT

GARRITY, J.

In accordance with the Court's "Memorandum and Order on Habeas Corpus Petition" filed on April 13, 1982, it is ORDERED:

> that the petitioner's petition for a writ of habeas corpus be, and it is hereby, granted and it is FURTHER ORDERED: that petitioner be released from his unconstitutional custody, namely, the personal recognizance of $500. to ensure his appearance before the jury session of the Boston Municipal Court, and that he not be retried before the jury session of the Boston Municipal Court on the same charges for which he was already tried in the first tier of the two-tier system and convicted based on insufficient evidence.

By the Court:

/s/_____

STEPHEN A. MOYNAHAN, JR.
Deputy Clerk

Dated: April 13, 1982

MICHAEL LYDON & another[1] vs. COMMONWEALTH.

Suffolk. May 6, 1980. — August 22, 1980.

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, KAPLAN, WILKINS, LIACOS, & ABRAMS, JJ.

Constitutional Law, Double jeopardy. *Supreme Judicial Court*, Superintendence of inferior courts. *Practice, Criminal*, "Two-tier" court system.

A defendant is not placed in double jeopardy merely because his only avenue of relief from a conviction based on insufficient evidence at a voluntarily sought bench trial is a trial de novo. [360-366] LIACOS, J., with whom ABRAMS, J., joined, dissenting.

Although a jury trial session is the appropriate forum for consideration of a double jeopardy claim asserted after a bench trial, the jury trial judge would have no occasion to consider the sufficiency of the evidence at the bench trial upon assertion of such a claim. [366-367]

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on February 5, 1980.

The case was reported by *Wilkins*, J.

Bonnie Spaccarelli Hannon (*Eva S. Nilsen* with her) for Michael Lydon.

Kenneth D'Arcy for Robert McDonald.

Michael J. Traft, Assistant District Attorney, for the Commonwealth.

Richard J. Hayes, William J. Leahy, Martin R. Rosenthal & Brownlow M. Speer, for the Massachusetts Defenders Committee, amicus curiae, submitted a brief.

WILKINS, J. This petition for relief under the general superintendence powers of this court (G. L. c. 211, § 3) is one of three similar cases decided today that raise questions concerning the application of the principles of *Burks* v. *United States*, 437 U.S. 1 (1978), to criminal cases in which

[1] Robert McDonald.

the accused has had a trial before a judge without a jury (a bench trial), and, dissatisfied with the result of the bench trial, has sought a de novo trial before a jury. The petitioners, whom we shall call the defendants, argue that the double jeopardy clause of the Fifth Amendment to the Constitution of the United States, as construed in *Burks* v. *United States*, *supra*, requires that the charges against each be dismissed following his bench trial because the evidence at the bench trial was insufficient to warrant the convictions.

Under the statutory provisions concerning the trial of cases in the Municipal Court of the City of Boston (Municipal Court), each defendant has the right to a jury trial in the first instance, but the defendants in this case elected instead to have a bench trial, preserving their right to have a jury trial if they were dissatisfied with the result of the bench trial. See G. L. c. 218, § 26A, which is set forth in the margin.[2] The defendants argued to the judge at their joint bench trial in the Municipal Court that the evidence did not warrant their convictions. The judge, however, found them guilty, and the defendants exercised their statutory right to appeal for a trial by a jury of six. Before the jury trial commenced, however, the defendants moved in the Municipal Court's jury trial session to have the charges against them dismissed because the evidence at the bench trial was inadequate to justify their convictions. When this motion was denied, the defendants filed a petition in the single justice session of this court seeking relief under G. L.

[2] General Laws c. 218, § 26A, inserted by St. 1978, c. 478, § 188, reads as follows: "Trial of criminal offenses in the Boston municipal court department and in the divisions of the district court department shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section twenty-seven A. Such waiver shall not be received unless the defendant is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in those jury sessions designated by said section twenty-seven A for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance."

c. 211, § 3. The single justice stayed the trial of these cases in the jury session of the Municipal Court, and, accepting the defendants' claim that the evidence at the bench trial did not warrant their convictions, reserved and reported two questions to the full bench, which are set forth in the margin.[3] The first of these questions inquires whether a defendant would be denied his right not to be placed in double jeopardy if he were required to go through a jury trial, when the evidence at the bench trial was inadequate to support his conviction. The second question concerns the procedural issue whether, assuming the existence of a double jeopardy claim, a jury-trial judge could or should reconsider the question of the sufficiency of the evidence which a bench-trial judge had decided adversely to a defendant.

The issues are important to the effective operation of the two-tier trial system in effect in the District and Municipal Courts of the Commonwealth. The present two-tier system was adopted, effective January 1, 1979, as part of the reorganization of the Commonwealth's judicial system pursuant to c. 478 of the Acts of 1978, commonly known as the Court Reorganization Act. In order to achieve a prompt and efficient disposition of the great number of criminal complaints filed each year in the District and Municipal Courts of the Commonwealth, involving relatively minor crimes, the concept of a bench trial was retained from the Commonwealth's earlier two-tier procedure. However, the Court Reorganization Act introduced a procedure that gave a defendant the right to a jury trial without the necessity of

[3] "1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him without waiving his rights, when the evidence at the bench trial was insufficient to warrant a conviction?"

"2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial has denied an appropriate request for a ruling that the evidence at the bench trial was insufficient?"

a prior bench trial.[4] As we have noted, a criminal defendant now is granted the choice of a jury trial in the first instance or a bench trial followed, if he so requests, by a de novo trial before a jury (or another judge, if the defendant waives his jury right).[5]

The circumstances of the defendants' trial are not important to the resolution of the questions of law reported to the court. The single justice did not report the issue whether the evidence warranted the defendants' convictions.[6] We treat the case as presenting squarely the question whether double jeopardy principles bar the retrial of a defendant who voluntarily chose to have a bench trial when the evidence at the bench trial was inadequate to warrant a conviction. We conclude that the defendants' voluntary choice of a bench trial and subsequent choice of a trial de novo

[4]This change in the two-tier system was proposed in the December, 1976, Report on the State of the Massachusetts Courts made by the Governor's Select Committee on Judicial Needs, commonly known as the Cox Committee. Recommendation 19 was "A defendant charged with a crime within the jurisdiction of the District Court should be offered an election between an immediate jury trial and an immediate bench trial subject to his right to claim a new trial with a six-person jury in the District Court." *Id.* at 32. Commenting on its recommendation, the Cox Committee said: "In this manner, the Commonwealth can eliminate the pitfalls and frustration of the present form of trial de novo and still retain an arrangement which disposes of minor criminal cases fairly yet with minimum cost." *Id.* at 33.

[5]The apparent preference of defendants for an initial bench trial, rather than an immediate jury trial, is demonstrated by data for the six months of operation of the Municipal Court's jury session under the new two-tier system. From January 1, 1979, through June 30, 1979, 1,751 complaints were received in that session of which only 158, or about 9%, were complaints tried before a jury in the first instance. [1979] Annual Report, The Office of the Chief Administrative Justice of the Trial Court 35 & 37. We note that thousands of complaints were finally disposed of by convictions at bench trials because the affected defendants did not seek a jury trial. *Id.* at 36.

[6]The single justice did not sit as a reviewing court in determining the sufficiency of the evidence. Thus, any conclusion reached by the single justice on this issue was made for the purpose of reporting clearly framed questions to the full bench and is not an adjudication of the rights of the parties in this case.

create a situation in which double jeopardy is not implicated. Thus, the defendants' constitutional challenge to the two-tier trial system, which provides a trial de novo as the sole means of obtaining relief from the unsatisfactory result in their bench trial, is without merit.

The defendants argue that they should not be required to undergo a second trial in order to have their convictions reviewed, because the evidence at their first trial was insufficient to warrant a conviction. They claim that a trial de novo would put them twice in jeopardy for the same crime, in contravention of the Fifth Amendment to the Constitution of the United States, made applicable to the States through the Fourteenth Amendment.[7] *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969). The defendants rely on *Burks* v. *United States*, 437 U.S. 1 (1978), to support their double jeopardy claim.[8] In that case, the Sixth Circuit Court of Appeals had reversed Burks' conviction because the evidence did not warrant a guilty finding and had remanded the case for consideration whether the circumstances warranted a new trial. *United States* v. *Burks*, 547 F.2d 968, 970 (6th Cir. 1976). The Supreme Court held, however, that it would be improper to retry Burks. The Court stated that a judgment of acquittal was required notwithstanding the fact that Burks had requested a new trial. 437 U.S. at 17-18.

The *Burks* case involved different circumstances from those before us because it dealt with an appellate determination that the evidence at trial did not warrant a conviction and a further determination that the double jeopardy clause barred a retrial in those circumstances. Burks was

[7] If the defendants have a valid double jeopardy claim, it properly should be dealt with in some forum before any second trial. *Costarelli* v. *Commonwealth*, 374 Mass. 677, 680 (1978). Immediate relief would be appropriate because, in such a case, the second trial itself would offend the constitutional guarantee. *Id.* *Abney* v. *United States*, 431 U.S. 651, 660-661 (1977) ("It is a guarantee against being twice put to *trial* for the same offense").

[8] On the same day as the *Burks* decision, the Supreme Court held in *Greene* v. *Massey*, 437 U.S. 19, 24 (1978), that the *Burks* principle was applicable to the States through the Fourteenth Amendment.

tried in a judicial system that provided for appellate review. No reviewing court has ruled on the sufficiency of the evidence at the bench trial in the present case. Under the two-tier system as it is designed to operate, no court would ever consider this issue. Thus, *Burks* v. *United States* is not applicable. The Court's holding in the *Burks* case was that "the Double Jeopardy Clause precludes a second trial *once the reviewing court has found the evidence legally insufficient.*" 437 U.S. at 18 (emphasis supplied).

The Court in the *Burks* case did not consider the question involved in the case before us, namely, whether under double jeopardy principles a defendant convicted on inadequate evidence at a bench trial has a right to a reconsideration of that ruling prior to a trial de novo. The defendants seek to extend the holding in *Burks* v. *United States*, *supra*, by arguing that that case requires the Commonwealth to provide a procedure by which the defendants can have another judge pass on the sufficiency of the evidence presented at his bench trial.

The defendants are correct in stating that, if they were to obtain a judgment of acquittal due to the insufficiency of evidence presented at their trial, they could not be retried. Double jeopardy protection under the Federal Constitution is afforded to criminal defendants regardless of whether such acquittal occurs at a bench trial, *Kepner* v. *United States*, 195 U.S. 100, 133 (1904), at a jury trial, *United States* v. *Ball*, 163 U.S. 662, 671 (1896), or on appeal, *Burks* v. *United States*, *supra*. Massachusetts heeds this constitutional mandate.[9] *Ludwig* v. *Massachusetts*, 427 U.S. 618,

[9]The *Burks* opinion introduced no new concept in the disposition of criminal appeals in this Commonwealth. At least in recent times, an appellate determination that the evidence did not warrant a conviction has resulted in an order for the dismissal of the charges and not in a new trial. See *Commonwealth* v. *Delgado*, 367 Mass. 432, 439 (1975); *Commonwealth* v. *Silva*, 366 Mass. 402, 410-411 (1974) (If motion to suppress had been allowed, as it should have been, a directed verdict would have been required. Judgment of not guilty ordered). After the *Burks* decision, we ordered the entry of a judgment of not guilty, citing the *Burks* case, where the trial judge erroneously failed to strike the testimony of a witness and,

631 (1976). But double jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of such conviction by resort to a second-tier trial. The distinction between a convicted defendant and an acquitted defendant in terms of double jeopardy protection was established in *United States* v. *Ball*, *supra* at 671-672. The validity of this distinction was reconfirmed in *United States* v. *Scott*, 437 U.S. 82, 88-89 (1978),[10] a case decided the same day as *Burks* v. *United States*, *supra*.

The defendants' argument that the Commonwealth has no legitimate State interest in retrying them overlooks the fact that the Commonwealth did not seek to retry them. The defendants were convicted of the crime of possession of burglarious instruments with the intent to commit larceny. The Commonwealth was content with that disposition. Although the defendants argue that the findings were erroneous, the convictions stood until the defendants requested a trial de novo, which was the only avenue of relief available to them.[11] The Commonwealth did not force the defendants to submit to a second trial. It simply did not provide

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when struck, the remaining evidence did not warrant guilty findings. *Commonwealth* v. *Funches*, 379 Mass. 283, 296-297 (1979). It was clear in the *Funches* case that the Commonwealth could not cure the insufficiency in the proof. See further discussion of the *Silva* and *Funches* cases in *A Juvenile* v. *Commonwealth (No. 2)*, *post* 379, 383 n.5 (1980).

[10] In the *Scott* case, the defendant was successful in obtaining a dismissal of an indictment because of preindictment delay. The Supreme Court, by a five to four vote, held that the government could appeal the dismissal because, if the appeal were successful, the defendant properly could be tried on the indictment without violating the defendant's double jeopardy rights.

[11] The situation here is analogous to the situation in *United States* v. *Ball*, 163 U.S. 662 (1896), where the Court held that the defendants' convictions were based on a fatally defective indictment. The Court held that, although the convictions below would not stand on appeal, "yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so avoided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good, and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*." *Id.* at 669-670.

the defendants a right of appeal or other review from their bench trial. None is constitutionally required. *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956).

A defendant's choice to have a bench trial in the first instance, without any prospect of review of errors occurring in the course of that trial, means that a considerable variety of errors might occur from which he could not obtain any relief. Many of these errors are of a type that could have a considerable effect on the result of the trial. The judge might misapply the law or improperly admit or exclude evidence, to the defendant's disadvantage (or advantage). There might be prosecutorial misconduct, or defense counsel's performance might be inadequate in a constitutional sense. However, errors of this nature in the trial of a case, even when they involve a misapplication of constitutional principles, have never been regarded as presenting a double jeopardy issue, that is, barring a second trial on double jeopardy grounds. "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Burks* v. *United States*, 437 U.S. at 15. And yet, an accused runs the risk of such errors by choosing to have an initial bench trial. We have never indicated that in making such an election the defendant must have knowingly considered and voluntarily waived all the potential errors of constitutional dimension.[11] But see *Clummei* v. *Commonwealth*, 378 Mass. 504 (1979) (explicit waiver of constitutional right of trial by jury required).

The two-tier court system has already withstood constitutional challenge in the United States Supreme Court. *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976). *Colten* v. *Kentucky*, 407 U.S. 104 (1972). Some form of two-tier system is

[11] The United States Supreme Court has noted that "the inferior courts are not designed or equipped to conduct error-free trials, or to insure full recognition of constitutional freedoms. They are courts of convenience, to provide speedy and inexpensive means of disposition of charges of minor offenses." *Colten* v. *Kentucky*, 407 U.S. 104, 117 (1972), quoting from *Colten* v. *Commonwealth*, 467 S.W.2d 374, 379 (Ky. 1971).

in effect in approximately one-half of the States. *Colten* v. *Kentucky*, *supra* at 112 n.4. It is difficult to conceive that the Supreme Court intended in its *Burks* decision to hold, by implication, that such a widely adopted system for dealing with less serious crimes is unconstitutional. See *Greene* v. *Massey*, 437 U.S. 19, 27 (1978) (Rehnquist, J., concurring).

The present Massachusetts two-tier system is indistinguishable from that of the Kentucky court system which was challenged on double jeopardy grounds in *Colten* v. *Kentucky*, *supra*, except that to avoid a trial at the first level of the Kentucky system, a defendant had to plead guilty in the inferior court and then request a trial "de novo." *Id.* at 112. A defendant tried in the District and Municipal Courts of Massachusetts may simply obtain a jury trial in the first instance without the stigma of a guilty plea on his record. But neither the Kentucky court system examined in *Colten* v. *Kentucky* nor the present Massachusetts two-tier system imposes two trials on criminal defendants. Thus, no double jeopardy problem is presented. *Colten* v. *Kentucky*, *supra* at 119-120.

The defendants in the present case elected to follow the procedure by which they obtained a bench trial, preserving their right to seek a jury trial if they were dissatisfied with the results of the bench trial. They could have obtained a jury trial in the first instance with a right of appellate review, and no question of double jeopardy would have arisen at the trial level.

The procedure by which a defendant elects a trial by a judge without a jury in the first instance is not casual. Section 26A of G. L. c. 218, inserted by St. 1978, c. 478, § 188, carefully defines the defendant's right to assure that the defendant makes an informed choice. Trials "shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to [§ 27A]." *Id.* No such waiver may be received "unless

the defendant is represented by counsel or has filed a written waiver of counsel." *Id.*[13]

A defendant obtains certain distinct advantages in having a bench trial followed by a jury trial, if he wishes. A bench trial serves as a means of discovery and recordation of the prosecution's testimony. Indeed, the judge may find the defendant not guilty. That would end the matter. A bench trial takes less time than a jury trial, offering the defendant a less expensive and less time consuming process. And, if the defendant does not like the result, he may obtain a second chance before a jury or, if he waives a jury, before a second judge, unfettered by the adverse decision previously made. The *Burks* opinion does not alter the statement in *Ludwig* v. *Massachusetts*, 427 U.S. 618, 632 (1976), that "[n]othing in the Double Jeopardy Clause prohibits a State from affording a defendant two opportunities to avoid conviction and secure an acquittal."

We acknowledge that "where the Double Jeopardy Clause is applicable, its sweep is absolute." *Burks* v. *United States*, 437 U.S. at 11 n.6. There are no equities to be balanced when the clause applies. We think that no double jeopardy is involved, however, when a criminal defendant voluntarily elects to accept the consequences of a procedure such as the optional two-tier system now in effect in the Commonwealth. We concur with the conclusion of the United States Supreme Court "that the Double Jeopardy

[13] Rule 12(A) of the Initial Rules of Criminal Procedure for the District Courts, effective on January 14, 1980, and not applicable to these defendants because they were arraigned in the Municipal Court of the City of Boston (and before January 14, 1980), provides in part:

> "The oral notice of right to first-instance jury trial shall include a statement to the defendant that if he or she waives this right he or she will receive a trial before a judge and if not satisfied with the results of that trial will be able to appeal for a new trial before a jury."

In light of this opinion, consideration might be given to enlarging the consent form so that the defendant acknowledges that his only avenue of relief from any error in the bench trial is a trial de novo.

Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 99 (1978). In effect, allowing a defendant to have a trial de novo, like requiring "a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction[,] is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *Id.* at 91.

We have discussed the double jeopardy issue in terms of the requirements of the Constitution of the United States. No separate argument has been made under the law of the Commonwealth, including the Massachusetts Constitution. The reported question was not limited to the Federal constitutional issue nor expressed solely in terms of constitutional rights. Although this court has never explicitly stated that our Declaration of Rights includes a double jeopardy guarantee (see *Commonwealth* v. *Cepulonis*, 374 Mass. 487, 491-492 [1978]), protection against double jeopardy in this Commonwealth has long been part of the common law. See *Gallinaro* v. *Commonwealth*, 362 Mass. 728, 736-737 (1973).

As a matter of common law, we have never held that double jeopardy principles are involved when a criminal defendant, who may have been erroneously convicted at a bench trial, is afforded no appellate or other review of the alleged error but is allowed to seek relief solely by the means of a new trial completely divorced from the record of the prior trial. See *Mann* v. *Commonwealth*, 359 Mass. 661, 664 (1971). The claim of appeal for a second trial has been treated as simply vacating the judgment of the court at the bench trial. See *Enbinder* v. *Commonwealth*, 368 Mass. 214, 217, cert. denied, 423 U.S. 1024 (1975), and cases cited. For the same reasons stated in our discussion on the Constitution of the United States, the circumstances of this case do not offend any provision in the Constitution of the Commonwealth extending double jeopardy protection.

We come then to the question, which is rendered largely academic by what we have already decided, namely wheth-

er the jury-trial judge could pass on the defendants' motion to dismiss on grounds of double jeopardy. We conclude that the jury trial session is the appropriate forum for consideration of double jeopardy claims asserted after a bench trial. If there is a valid double jeopardy claim, it should be dealt with before, rather than after, the second trial. See note 7, *supra*.

In *Whitmarsh* v. *Commonwealth*, 366 Mass. 212, 216 (1974), appeal dismissed, 421 U.S. 957 (1975), we denied relief under G. L. c. 211, § 3, noting the availability of relief for a double jeopardy claim by means of a motion to dismiss filed in the Superior Court after a District Court bench trial. That opinion considered the procedure for raising double jeopardy issues under the former two-tier system,[14] but the result is no different under the current two-tier system. Rule 13 (c) (2) of the Massachusetts Rules of Criminal Procedure (378 Mass. 873 [1979]) provides that "[a] defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion." Consequently, the defendants' motion to dismiss properly should have been considered on the merits in the jury trial session. See *A Juvenile* v. *Commonwealth (No. 1)*, 380 Mass. 552, 557-558 (1980); *Connaughton* v. *District Court of Chelsea*, 371 Mass. 301 (1976).

We answer the first reported question in the negative. A defendant is not placed in double jeopardy merely because his only avenue of relief from a conviction based on insufficient evidence at a voluntarily sought bench trial is a trial de novo. As to the second reported question, the jury-trial judge would have no occasion to consider the sufficiency of the evidence at the bench trial. Because there would be no valid double jeopardy claim, even if the evidence were insufficient to warrant the conviction, the jury-trial judge's only option would be to deny such a motion. The case is remanded to the county court for the entry of judgment.

So ordered.

[14] See *Gibson* v. *Commonwealth*, *post* 372 (1980), where we discuss the jurisdiction of the Superior Court to consider such a motion under the former two-tier system.

LIACOS, J. (concurring in part and dissenting in part, with whom Abrams, J., joins). Today the court addresses the constitutionality of an aspect of the optional two-tier system of criminal trials described in part in G. L. c. 218, § 26A, inserted by St. 1978, c. 478, § 188. Under this system, a defendant who chooses a bench trial and is convicted on insufficient evidence can be retried de novo to a jury, but he has no other avenue of relief. The majority conclude that this practice does not offend the double jeopardy clause of the Federal Constitution. I respectfully disagree.

The double jeopardy clause creates a constitutional policy against multiple trials of a criminal defendant. See *Green* v. *United States*, 355 U.S. 184, 187-188 (1957). If the prosecution received "one fair opportunity to offer whatever proof it could assemble," but the proof was insufficient, retrial of the defendant would frustrate the purposes of the double jeopardy clause. *Burks* v. *United States*, 437 U.S. 1, 16 (1978). See *Greene* v. *Massey*, 437 U.S. 19 (1978).[1]

The majority declare that "double jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of such conviction by resort to a second-tier trial." *Supra* at 362. *Burks*, however, focused on the nature of the error committed at the first trial, not on acquittal or conviction. Thus, if the error is mere "trial error," which "implies nothing with respect to the guilt or innocence of the defendant," the defendant may be retried. *Burks*, *supra* at 15. If, on the other hand, the government failed to prove its case, retrial is impermissible. *Id.* at 16. The evil at stake is that a defendant against whom the prosecution

[1] Our previous two-tier system survived a general double jeopardy challenge. *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976). A system somewhat similar to our present one withstood a general challenge in *Colten* v. *Kentucky*, 407 U.S. 104 (1972). However, neither decision addressed the situation in which evidence at the first trial was insufficient. See *Gibson* v. *Commonwealth*, *supra*. Both *Ludwig* and *Colten* were decided, moreover, prior to *Burks*, in which the Court first drew a clear distinction between failure of proof and mere trial error, thus overruling a number of earlier cases dealing with double jeopardy claims.

has not been able to muster even a prima facie case must endure a second trial.

The majority impose a precondition for attachment of the defendants' double jeopardy rights; an appellate determination that the evidence was insufficient to convict him.[2] In so doing, the majority disregard the substantive mandate of *Burks* and fix upon a formal nicety wholly unrelated to the purposes of the double jeopardy clause. If a defendant is convicted on insufficient evidence, he cannot be retried, and it should matter not at all whether an appellate court has confirmed the insufficiency.

The double jeopardy clause requires the prosecution to prove its case in one trial. If the prosecution's evidence was so weak that no reasonable trier of fact could conclude that the defendants were guilty beyond a reasonable doubt, this principle applies with special force. The majority choose to ignore this logic. They would put the defendants here through the "embarrassment, expense and ordeal" of a second trial, and would consign them for a second time to "a continuing state of anxiety and insecurity." *Green* v. *United States*, *supra* at 187. They refuse to recognize that the double jeopardy clause safeguards against just such mistreatment at the hands of the criminal justice system. After today, the enforceability of the *Burks* right will depend largely upon the sufferance of the Legislature. If the Legis-

[2] The majority cite *United States* v. *Scott*, 437 U.S. 82, 88-89 (1978), in support of their distinction. *Supra* at 362. *Scott* involved an appeal by the government. But, in summary, that discussion merely states: "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, . . . poses no bar to further prosecution on the same charge." *Id.* at 90-91. For a defendant convicted at a first trial, the *Scott* opinion does not abrogate the distinction between evidentiary insufficiency and trial error. Indeed, the careful distinctions drawn in *Scott* as to dismissal of an indictment for reasons other than failure of proof support my view. "In the present case, the District Court's dismissal of the first count of the indictment [after the close of all of the evidence] was based upon a claim of preindictment delay and not on the court's conclusion that the Government had not produced sufficient evidence to establish the guilt of the defendant." *Id.* at 95.

lature chooses to provide a criminal defendant with no avenue of relief other than a second trial, the defendant's constitutional right must languish among shadows.

The majority opinion states: "We think that no double jeopardy is involved . . . when a criminal defendant voluntarily elects to accept the consequences of a procedure such as the optional two-tier system now in effect in the Commonwealth." *Supra* at 365. The majority point out that the defendants, not the Commonwealth, sought a trial de novo and that the Commonwealth simply provided the defendants with no other right to review of the bench trial.

The majority seem to treat a defendant's "voluntary" choice of a bench trial and subsequent "choice" of a trial de novo as a waiver of his double jeopardy rights.[3] But waiver of rights under the double jeopardy clause, like waiver of other constitutional rights, must be knowing and voluntary. *Green* v. *United States*, *supra* at 191. Even if the Commonwealth is not obliged to furnish a defendant with an avenue of appeal, a defendant choosing the bench trial should understand what he is giving up. Yet the majority seem oblivious to this principle. They make no provision that a defendant understand he is giving up his right not to be tried a second time after being convicted on insufficient evidence.[4] However, if a defendant's choice of a bench trial was not made intelligently, then he did not choose to accept

[3] "We conclude that the defendants' voluntary choice of a bench trial and subsequent choice of a trial de novo create a situation in which double jeopardy is not implicated." *Supra* at 359-360. "[D]ouble jeopardy protection is not applicable to a defendant who is convicted and seeks reversal of such conviction by resort to a second-tier trial." *Supra* at 362. Such language disregards the clear language of *Burks* to the contrary: "In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy." *Burks* v. *United States*, 437 U.S. 1, 17 (1978).

[4] The majority point out that a defendant who chooses a bench trial may obtain tactical and other advantages. *Supra* at 365. However, a defendant's choice is not meaningful, in constitutional terms, unless he also understands that he is giving up his constitutional right. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

the consequences of his choice. He did not choose to make a second trial his only avenue of relief from a conviction in the first trial. If a defendant's initial choice was not intelligent, it is pointless to say that the Commonwealth does not force him to endure a second trial.

The majority do not suggest that the present two-tier system makes provision for explicit waiver of the right to avoid a second trial after a bench trial conviction on insufficient evidence. Nor does such a waiver appear affirmatively in the report or the record. See *Ciummei* v. *Commonwealth*, 378 Mass. 504 (1979). Therefore, I would answer the first reported question in the affirmative.

On the second question, as if to carry their sophistical exercise a step further, the majority assert that the defendants, in a case such as this one, can raise their double jeopardy claims before the jury-trial judge. But what can be the purpose of this review? According to the majority, the defendants have no double jeopardy claim. Thus, for defendants such as Michael Lydon and Robert McDonald, the procedure before the jury-trial judge can only be charade in which the defendants' motion to dismiss inevitably will be denied. Perhaps the real purpose of this review is to give the jury-trial judge a chance to rule on the sufficiency of the evidence and thus to nullify the inexplicable result reached today.[5]

Because I would answer the first reported question in the affirmative, I concur with the majority's answer to the second question. The jury trial session is the proper forum for a defendant to raise a double jeopardy claim arising at his bench trial.

[5]The majority do not state that this review is available for all double jeopardy claims arising from the bench trial, or for claims unlike Lydon's and McDonald's.

Michael LYDON, Plaintiff,

v.

The JUSTICES OF the BOSTON MUNICIPAL COURT, et al., Defendants.

Civ. A. No. 81-2311-G.

United States District Court,

D. Massachusetts.

April 13, 1982.

MEMORANDUM AND ORDER ON HABEAS CORPUS PETITION

GARRITY, District Judge.

Petitioner Michael Lydon seeks a writ of habeas corpus to prevent Massachusetts from trying him a second time pursuant to its two-tier trial system. Petitioner contends that a second trial under the circumstances of his case would violate the double jeopardy clause of the federal constitution. Respondents have moved to dismiss on the grounds that the court lacks jurisdiction, that petitioner has not exhausted state remedies and that the double jeopardy clause does not bar a retrial as provided here.

Massachusetts provides that criminal defendants to certain specified charges who are to be tried in the Boston Municipal Court may elect to waive the right to a jury trial in the first instance and instead proceed to a bench trial. Mass.G.L. c. 218, §§ 26, 26A. If the defendant is dissatisfied with the result of the bench trial, he may then elect to proceed to a jury trial *de novo* as his sole available remedy. He need not, however, undergo the jury trial but may instead accept the verdict of the judge at the bench trial in the Boston Municipal Court. And, if he is acquitted after the bench trial, the state cannot subject him to the second trial.

Petitioner, who was charged with illegal possession of burglarious implements, elected an initial bench trial and was convicted. His objection that the prosecution had failed to introduce sufficient evidence of the requisite illegal intent, an element of the crime, was denied. He then requested a jury trial *de novo*, but prior to the jury trial moved to dismiss the charges on the ground that retrial would violate the double jeopardy clause. That motion was denied without a hearing. Lydon then petitioned the single justice session of the Supreme Judicial Court for relief under G.L. c. 211, § 3. The prosecution conceded, and the single justice concluded, that the evidence had in fact been insufficient to convict. The single justice did not, however, report that finding to the full Supreme Judicial Court but instead stayed the trial and reported two other questions to the full court: Whether a defendant would be denied his right not to be placed in double jeopardy if required to go through a jury trial requested by him when the evidence at the bench trial was inadequate to convict and whether, assuming a jury trial would violate the double jeopardy clause, the jury trial judge could reconsider the sufficiency of the evidence if the judge at the bench trial had decided it was sufficient. The S.J.C. held, in a 5-2 decision, that the jury trial under the Massachusetts two-tier system did not violate the double jeopardy clause where the initial conviction was supported by insufficient evidence. All seven justices, however, believed that if such a jury trial would violate the double jeopardy clause, the jury trial judge could reconsider the adequacy of the evidence at the first trial. Lydon subsequently filed his petition in this court for habeas relief. The court received briefs and heard argument on November 4, 1981.

A district court has jurisdiction to consider an application for a writ of habeas corpus on behalf of an individual in custody pursuant to judgment of a state court, only if the in-

dividual "is in custody in violation of the Constitution or laws or treaties of the United States", 28 U.S.C. § 2254(a), and has exhausted available state remedies, 28 U.S.C. § 2254(b). Petitioner has satisfied the jurisdictional prerequisites.

[1] The "in custody" requirement of the habeas corpus statute does not condition habeas jurisdiction on actual physical confinement or restraint. Rather, it refers to various restraints on liberty "not shared by the public generally." *Jones v. Cunningham*, 1963, 371 U.S. 236, 240, 83 S.Ct. 373, 375, 9 L.Ed.2d 285. Thus, an individual who has been released on his own recognizance following conviction is "in custody" within the meaning of the habeas corpus statute. *Hensley v. Municipal Court*, 1973, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed. 2d 294. Petitioner is such an individual.

Although an individual released on bail or on his own recognizance would be "in custody" he would not necessarily be able to petition for habeas relief. Rather, "he must still contend with the requirements of the exhaustion doctrine if he seeks habeas corpus relief in the federal courts." *Hensley v. Municipal Court*, *supra* at 353, 93 S.Ct. at 1575.

Defendants here point out, however, that 28 U.S.C. § 2254 (a) confers jurisdiction on this court to entertain a habeas petition brought by one in custody pursuant to a state court judgment "only on the ground that he is in custody in violation of the [United States] Constitution" or other federal law. Here, defendants argued, petitioner does not challenge the constitutionality of his custody but only the ability of the court to proceed with his jury trial *de novo*. We reject this argument.

[2] First, petitioner implicitly claims that "he is in custody in violation of the constitution." Had the court at petitioner's bench trial found petitioner not guilty, there would, of course, be no basis for the imposition of bail or other custody. Here petitioner contends that the evidence at the bench trial was insufficient to convict him so that he should have been found not

guilty. A second trial, petitioner contends, would violate his rights under the double jeopardy clause. Yet the prospect of the second trial constitutes the basis for subjecting petitioner to custody. Therefore, petitioner's allegation is, essentially, that the custody violates the Constitution.

[3] Second, it often is appropriate to assume jurisdiction to consider the merits of a pretrial writ of habeas corpus where petitioner claims the pending trial would place him in jeopardy a second time for the same offense. "Because the double jeopardy clause is designed to protect a defendant not only from double conviction but also from being subjected twice to the trial process itself . . . a federal court is in the extraordinary position of having no way to protect a defendant's constitutional right other than to consider a petition before trial." *Benson v. Superior Court Department of the Trial Court of Massachusetts*, 1 Cir. 1981, 663 F.2d 355, 359; cf. *Abney v. United States*, 1977, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (pretrial order denying motion to dismiss indictment is appealable to preserve defendant's double jeopardy rights). Thus, we conclude that the requirements of 28 U.S.C. § 2254 (a) are satisfied where an individual who is in custody pending a trial asserts that the trial would violate the double jeopardy clause.

[4, 5] For habeas jurisdiction to exist, however, the petitioner must also have exhausted available state remedies. 28 U.S.C. § 2254(b). Even where the petition is based on a double jeopardy claim, the petitioner retains some responsibility to exhaust pretrial opportunities to raise that claim before the state court. *Benson v. Superior Court Department of Trial Court of Massachusetts, supra* at 359. Petitioner here has done so. As recounted above, Lydon (a) moved to dismiss charges against him on the grounds that the evidence at the bench trial was insufficient, (b) petitioned the single justice session of the S.J.C. for relief from the denial of that motion,

(c) presented the same claim he presents here to the S.J.C., and (d) petitioned the United States Supreme Court for a writ of certiorari, which was denied. He has exhausted all available state remedies short of submitting to the second trial. *Benson* requires that he do not more. See also *Drayton v. Hayes*, 2 Cir. 1979, 589 F.2d 117, 120-21. To hold that the exhaustion requirement means that petitioner must face a second trial before seeking habeas relief might subject him to one of the evils which the double jeopardy clause proscribes — multiple trials — in order to qualify for a determination of whether the trial violated that clause.

[6] Having determined that this court has jurisdiction to consider this habeas petition, we turn now to petitioner's substantive claim that application of the Massachusetts two-tier trial system violated rights the double jeopardy clause protects. The corpus of writing on this case already includes two scholarly opinions by justices of the S.J.C. which clearly present the opposing arguments, *Lydon v. Commonwealth*, 381 Mass. 356, 409 N.E.2d 745 (1980), *cert. denied* 1980, 449 U.S. 1065, 101 S.Ct. 792, 66 L.Ed.2d 609, and a lengthy law review discussion. See Comment, "Double Jeopardy Problems Presented by Two Tier Systems," 69 *Georgetown Law Journal* 1525 (1981). We will not review and discuss again the competing arguments which Justices Wilkins and Liacos have so carefully presented and instead will incorporate their opinions by reference and confine our treatment to stating the considerations which ultimately have influenced our decision.

To begin with, we do not believe that any prior case cited by petitioner or respondent covers the precise situation present here. In *Burks v. United States*, 1978, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1, the Supreme Court held that the double jeopardy clause precludes retrial of a defendant whose conviction had been reversed by an appellate court solely for insufficient evidence even if defendant moved for a new trial. Re-

cently, the court held in *Hudson v. Louisiana*, 1981, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30, that *Burks* applies also when the trial court judge on a motion for a new trial, rather than a higher court on review, determines that the evidence was insufficient. This case differs from *Burks* in two ways which Justice Wilkins pointed out. *Burks* did not deal with a two-tier system. Moreover, unlike *Burks*, here no reviewing court has ruled, or would have the opportunity to rule that the evidence at the bench trial was insufficient. *Lydon v. Commonwealth*, *supra* 381 Mass. 356, 409 N.E.2d 745 (1980). *Hudson*, too, is distinguishable since the jury trial court in the present case denied Lydon's motion to dismiss. Cases upon which respondent relies, particularly *Ludwig* v. *Massachusetts*, 976, 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732, and *Colten v. Kentucky*, 1972, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584, in which the Supreme Court upheld two-tier systems, including the previous Massachusetts provision, against double jeopardy attacks, are also not controlling. Those cases did not address the situation in which evidence at the first trial was insufficient. See *Lydon v. Commonwealth*, *supra* 381 Mass. 356, n. 1, 409 N.E.2d 745 (1980) (Liacos, J., dissenting). Moreover, those cases antedated *Burks* and rested on a premise that *Burks* substantially altered. The Court made that premise explicit in *Ludwig*, the case in which it upheld the Commonwealth's prior two-tier system, when it said: "A defendant who elects to be tried *de novo* in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these circumstances, it has long been clear that the State may reprosecute." *Ludwig v. Massachusetts*, *supra* 427 U.S. at 631-32, 96 S.Ct. 2788-89. After *Burks*, however, a defendant who gains a reversal based on insufficient evidence at the first trial may no longer be reprosecuted. Thus,

the Massachusetts system at issue in *Ludwig* no longer parallels the constitutional norm and *Ludwig* accordingly does not direct the outcome here.

Although the prior Supreme Court decisions may be distinguished in some particulars, we conclude based on the principles they represent that retrial of Lydon under the Massachusets two-tier system would deny him rights protected by the double jeopardy clause if his conviction was, in fact, based on insufficient evidence. We take *Burks* as our starting point. It held that the double jeopardy clause of the Fifth Amendment confers a constitutional right on criminal defendants not to be retried when there was insufficient evidence to convict at the first trial. That rule also applies to state defendants, *Greene v. Massey*, 1978, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15, and to defendants who seek a new trial, *Burks v. United States*, *supra* 437 U.S. at 17, 98 S.Ct. at 2150.

We are mindful, of course, that the Constitution does not require states generally to provide appellate review for criminal convictions. *Griffin v. Illinois*, 1956, 351 U.S. 12, 18, 21, 27, 76 S.Ct. 585, 590, 591, 594, 100 L.Ed. 891; *McKane v. Durston*, 1894, 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867, but we do not believe that that rule, coupled with the fact that a state chooses not to provide for review of a bench trial verdict, immunizes the state from federal constitutional promises. *Burks* does not become relevant, in our view, only after a reviewing court has found the evidence insufficient to convict. Rather it bestows a constitutional right upon defendants not to be retried when the initial conviction rests on insufficient evidence. The state is duty-bound to protect that right. Recognizing that double jeopardy rights must be protected prospectively, courts have fashioned special procedures to do so. See, e.g., *Abney v. United States*, *supra*; *Benson v. Superior Court*, *supra*. Respondents' preoccupation with whether there was an appellate determination of insufficient evidence strikes us

as "a formal nicety wholly unrelated to the purposes of the double jeopardy clause." *Lydon v. Commonwealth, supra* 381 Mass. 356, 409 N.E.2d 745 (1980) (Liacos, J., dissenting).

Lydon did not waive the protection against double jeopardy either by electing initially a bench, rather than jury, trial or by moving for a jury trial following his initial conviction. There is no evidence that Lydon had a "meaningful choice" and made a "voluntary knowing relinquishment of a right," *Green v. United States*, 1957, 355 U.S. 184, 191-92, 78 S.Ct. 221, 225-26, 2 L.Ed.2d 199, in submitting initially to a bench trial since it is not clear that he appreciated that in so doing he was waiving rights protected by the double jeopardy clause. And *Burks* makes it clear that it "cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial." *Burks v. United States, supra* 437 U.S. at 17, 98 S.Ct. at 2150. See also *Hudson v. Louisiana, supra*.

Since conducting a jury trial *de novo* would abridge rights the double jeopardy clause protects, if Lydon's conviction rested on insufficient evidence, we conclude that petitioner does state a claim upon which relief can be granted and so deny respondent's motion to dismiss. We turn now to the merits of petitioner's claim. The question that remains is whether the evidence at the first trial was insufficient. Justice Wilkins, who considered the case in the single justice session, concluded at page three of his "Reservation and Report of Questions Arising in the Plaintiffs' Petition for Relief Under G.L. c. 211, § 3" that "the evidence was not sufficient to warrant guilty findings." The S.J.C. majority made clear, in an opinion Justice Wilkins wrote, that he "did not sit as a reviewing court in determining the sufficiency of the evidence" but rather framed questions for the full court to consider. *Lydon v. Commonwealth, supra* ____ Mass. at ____, n. 6, 1980 Mass. Adv. Sh. at 1918 n. 6, 409 N.E.2d 745. Justice Wilkins also observed in the above-cited "Reservation and Report" that the "Common-

wealth concedes that the evidence presented was insufficient to warrant a finding of guilty on the charges as set forth in the complaint."

[7, 8] Since Justice Wilkins did not sit as a reviewing court in assessing the sufficiency of the evidence, we do not treat his "Reservation and Report" as an adjudication on the merits.[1] Rather, in order to make an independent determination of the sufficiency of the evidence, we have reviewed the "Transcript of the Evidence" at Lydon's bench trial on November 9, 1979, a copy of which, stipulated by the parties to be accurate, is Appendix C to the petition. Justice Wilkins pointed out at page 3 of his "Reservation and Report" that the Commonwealth's complaint alleged that Lydon knowingly possessed implements designed to break open a depository (here an automobile) to steal money or property from it, in violation of Mass.G.L. c. 266, § 49. The trial transcript contains "no evidence that Lydon intended to steal money or property from the automobile, an essential element of the crime charged. Thus, we conclude, based on our review of the transcript, that the evidence at petitioner's bench trial was insufficient to convict him. It follows from the earlier discussion of this memorandum that a trial *de novo* under Massachusetts' two-tier system would violate petitioner's double jeopardy rights. Accordingly, we grant the petition for a writ of habeas corpus.

We note, in concluding, that our holding, while granting the immediate petitioner's writ, need not eliminate nor even work substantial change in the operation of Massachusetts' two-tier system. The defects could be cured in several ways. The state could expand the initial consent process so that a judicial officer would explain that if the defendant elected to

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[1] We do, however, adopt and incorporate by reference the helpful discussion and reasoning on pages 3 to 7 of his "Reservation and Report" to the extent pertinent to our determination of the sufficiency of the evidence.

begin with a trial his only recourse from a conviction would be a jury trial *de novo, Lydon v. Commonwealth, supra* 381 Mass. 356 n. 13, 409 N.E.2d 745 (1980), and the constitutional significance of that waiver. The state could, alternatively, provide a forum to review the bench trial verdict. Indeed, the S.J.C. in *Lydon* unanimously agreed that if the two-tier system did infringe double jeopardy rights a judge at the jury trial session could properly decide a double jeopardy challenge to the sufficiency of the evidence. *Lydon v. Commonwealth, supra* 381 Mass. 356, 409 N.E.2d 745 (1980). Or, the state could fashion a system that would preclude the prosecution from offering new evidence at the second level. See, e.g., *Swisher v. Brady*, 1978, 438 U.S. 204, 98 S.Ct. 2699, 57 L.Ed.2d 705.

ORDER

Consistent with, and pursuant to, this memorandum of law, we deny respondents' motion to dismiss and grant petitioner's petition for a writ of habeas corpus and, accordingly, order that petitioner be released from his unconstitutional custody, namely, the personal recognizance of $500 to ensure his appearance before the jury session of the Boston Municipal Court, and that he not be retried before the jury session of the Boston Municipal Court on the same charges for which he was already tried in the first tier of the two-tier system and convicted based on insufficient evidence. Since we understand that petitioner, by claiming a jury trial *de novo*, wiped out the bench trial verdict and sentence so that petitioner is no longer subject to that sentence, we take no further action.

Michael LYDON, Plaintiff, Appellee,

v.

JUSTICES OF the BOSTON MUNICIPAL COURT,
Defendants, Appellants.

No. 82-1376.

United States Court of Appeals,
First Circuit.

Argued Sept. 13, 1982.

Decided Dec. 30, 1982.

BREYER, Circuit Judge.

The habeas corpus petitioner in this case was convicted of a state crime by a Massachusetts judge under the Massachusetts "two-tier" criminal trial procedure. As is his right under that procedure, the petitioner then chose to have a completely new trial by jury. He argued, however, to the new trial court, to the Massachusetts Supreme Judicial Court, and then to the federal district court, that he must be released, rather than undergo a new trial, because his bench trial conviction rested on insufficient evidence and any new trial would therefore place him in double jeopardy, in violation of the Fifth Amendment to the United States Constitution.

The federal district court reviewed the trial record and found that the evidence at the bench trial was constitutionally insufficient for conviction. The court further found that the state had not obtained defendant's informed consent to run a risk of double jeopardy harm, though it was not (nor in the future would it be) difficult for the state to seek such informed consent from criminal defendants. It held that a second trial was therefore barred by the Double Jeopardy Clause. *Lydon v. Justices of Boston Municipal Court*, 536 F.Supp. 647 (D.Mass. 1982). We agree with the district court and affirm its decision.

I.

The Massachusetts two-tier system, like others in nearly half the states, allows a defendant to choose either the standard route of a jury trial with appellate review, or the two-tier route. *See* Comment, *Double Jeopardy Problems Presented by Two Tier Systems*, 69 Geo.L.J. 1525, 1527 (1981). If he chooses the latter alternative, he first receives a bench trial. If he is convicted, he then has an absolute right to choose a second trial to take place de novo, either before a jury, or (if the defendant waives the jury) before another judge. Mass.Gen. Laws ch. 218, §§ 26, 26A, 27A. The original system did not permit the initial choice — all defendants went through both tiers of the system. *See Ludwig v. Massachusetts*, 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976). The present system is the product of the Court Reorganization Act, Chapter

478 of the Act of 1978, *see* Note, *Double Jeopardy and the De Novo System*, 16 New England L.Rev. 303, 308-09 (1981), following recommendations made by the Governor's Select Committee on Judicial Needs (the "Cox Committee") in 1976.

Prior to 1978, it would have been difficult to see how, from a constitutional perspective, this system could work to a defendant's disadvantage. For one thing, he is free to disregard the system by choosing an initial trial by jury. For another, if he chooses the two-tier alternative, he is entitled to a totally new trial on request. It is as if the state automatically accepts any complaint a defendant may have about his first trial; a new trial is always granted. *See Ludwig v. Massachusetts*, 427 U.S. at 631, 96 S.Ct. at 2788. At the same time, the system saves both the state and the defendant time and expense, because many defendants, presumably after seeing the evidence against them, do not seek the automatic new trial to which they have a right. Thus, the Massachusetts Supreme Judicial Court wrote that only about 9 percent of the criminal defendants in Boston chose a jury trial in the first instance, and "thousands of complaints were finally disposed of by convictions at bench trials because the affected defendants did not seek a jury trial." *Lydon v. Commonwealth*, 381 Mass. 356, ____ n. 5, 409 N.E.2d 745, 748 n. 5 (1980).

In 1977 and 1978, however, the Supreme Court broadened the scope of defendant's double jeopardy protection in a way perhaps not foreseen by the Massachusetts system's reformers. In *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), the Court overturned a prior line of cases and held that once "a reviewing court has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury," the Double Jeopardy Clause forbids a retrial. 437 U.S. at 5, 98 S.Ct. at 2144 (record review made by a federal appellate court); *accord*, *Hudson v. Louisiana*, 450 U.S. 40,

101 S.Ct. 970, 67 L.Ed.2d 30 (1981) (record review made by a state trial court). Then in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the Supreme Court held that a federal habeas court must look to see whether a state conviction rests upon enough evidence to convince a rational trier of fact to find guilt beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (a conviction failing to meet that standard violates the Fourteenth Amendment "due process" clause). Petitioner believes that, under *Jackson*, the federal habeas court here properly determined that the evidence at the first trial was constitutionally insufficient and, hence, under *Burks*, he cannot be retried — he is entitled to unconditional release from custody.

Before evaluating petitioner's arguments, we shall describe the procedural context in which this case arises. The petitioner, Lydon, was charged with possessing implements designed to break open a "depository" (here, an automobile) in order to steal money or property from it. He chose to participate in the two-tier system. He was convicted at the first tier. The trial judge rejected his claim that the prosecution had not presented evidence of one key element of the offense charged, namely, an intent to steal money or property from the car.

Lydon asked for a trial de novo by a jury. He then asked the jury-trial judge to dismiss the charges on double jeopardy grounds. The motion was denied. A single justice of the Massachusetts Supreme Judicial Court, however, stayed the second trial and heard Lydon's claim. The justice was willing to assume the evidence was inadequate, and, on that assumption, asked the full court in the exercise of its "superintendence powers," Mass.Gen.Laws ch. 211, § 3, to answer two questions:

1. Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, . . . when the evidence at the bench trial was insufficient to warrant a conviction?
2. Assuming that a jury trial in such an instance would be a denial of a defendant's right not to be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level . . . ?

Lydon v. Commonwealth, 381 Mass. 356, ____ n. 3, 409 N.E.2d at 747 n. 3.

The Supreme Judicial Court answered the first of these questions in the negative. It reasoned, first, that the initial trial judge had held that the evidence against Lydon *was* sufficient; since the state system did not provide for any review of that holding, no double jeopardy claim could arise. Second, regardless of whether the evidence was sufficient, there was no constitutional injury. Lydon chose to enter a system where a new trial would be his for the asking; in return, he must accept the fact that his only remedy would be a new trial. The Double Jeopardy Clause protects against governmental oppression; here, there was no such oppression because Lydon had volunteered to participate in the two-tier system.

The Supreme Judicial Court went on to answer the second question affirmatively, but added that its answer was "largely academic." Since Lydon had no double jeopardy right, the second trial court would not pass upon the adequacy of the evidence at the first trial.

Lydon sought certiorari, which was denied, and then sought habeas corpus. The federal district court, in the habeas proceeding, reviewed the original trial transcript and found the evidence to be constitutionally insufficient. The district court concluded that retrial was barred by the Double Jeopardy Clause. It ordered Lydon released and prohibited his retrial.

The Commonwealth has appealed. It obtained a stay of the district court's order pending his appeal. The Commonwealth has stated it will not retry the petitioner until the appeal is decided. Lydon is currently released on "personal recognizance."

II

We must first decide whether the district court had authority to review the record of Lydon's bench trial to determine whether the evidence was sufficient for conviction. Otherwise, the district court, faced with an authoritative state court finding that the evidence *was sufficient*, would have seen no double jeopardy problem. We believe that the district court had this authority.

[1] 1. Contrary to the Commonwealth's contention, Lydon met the technical "custody" requirements of the two habeas corpus statutes relevant here, 28 U.S.C. § 2241(c)(3) and 28 U.S.C. § 2254. The first of these statutes authorizes the writ to be issued on behalf of "a prisoner . . . in custody in violation of the Constitution . . . of the United States. . . ." The second

authorizes its issuance on behalf of "a person in custody pursuant to the judgment of a state court" on the ground, (among others) "that he is in custody in violation of the Constitution . . . ."

It is now well established that release on personal recognizance is "custody" within the meaning of both of these habeas corpus statutes. *Hensley v. Municipal Court*, 411 U.S. 345, 93 S.Ct. 1571, 36 L.Ed.2d 294 (1973). Personal recognizance subjects an individual to restraints "not shared by the public generally," for "state judicial officers may demand his presence at any time," and "[d]isobedience is itself a criminal offense." 411 U.S. at 351, 93 S.Ct. at 1574. In this instance, if Lydon failed to appear for his jury trial, his original sentence could be reimposed. Mass.Gen.Laws ch. 278, § 24. Moreover, although the state characterizes Lydon's choice of a new trial as a choice that "wipes out" the first court's judgment, the fact is that Lydon is under special restraint because he was found guilty at the bench trial; otherwise, he would have been released. Lydon is essentially in the same position as the defendant in *Hensley*, who "remained at large under an order of the state court staying execution of his sentence." 411 U.S. at 347, 93 S.Ct. at 1573. We therefore believe that Lydon is in "custody" under the less restrictive language of § 2241(c)(3) and also under the more restrictive language of § 2254, which requires that the custody be "pursuant to the judgment of a state court." *Cf. Thames v. Justices of the Superior Court*, 383 F.Supp. 41, 43 (D.Mass. 1974) (release on bail after a mistrial is "custody" under both § 2254 and § 2241).

[2] 2. Once the technical custody problems are met, at least as a general matter, a habeas court can review a petitioner's claim that a state court conviction rests upon insufficient evidence. *Jackson* v. *Virginia*, *supra*. The constitutional basis for such review arises from the fact that if, "after viewing the evidence in the light most favorable to the prosecution," no

"rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the state conviction violates the Fourteenth Amendment's "due process" requirements. 443 U.S. at 319, 99 S.Ct. at 2789. *See Johnson v. Louisiana*, 406 U.S. 356, 362, 92 S.Ct. 1620, 1624, 32 L.Ed.2d 152 (1971); *In re Winship*, *supra*. And, "assuming that state remedies have been exhausted, and that no independent and adequate state ground stands as a bar, it follows that such a claim is cognizable in a federal habeas corpus proceeding." *Jackson v. Virginia*, 443 U.S. at 321, 99 S.Ct. at 2790 (citations omitted).

[3] 3. While we recognize potential practical problems related to the proper timing of habeas "evidence sufficiency" review, *cf. Stevens v. Circuit Court of Milwaukee County*, 675 F.2d 946 (7th Cir. 1982), 23 believe that here review of Lydon's claim before state court retrial was appropriate. For one thing, Lydon's sufficiency of the evidence claim is part of his double jeopardy attempt to prevent the retrial with which he is directly and immediately threatened. He seeks habeas relief now to avoid the very psychological and material hardships of a second trial that the Double Jeopardy Clause seeks to prevent. *See Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). Unless habeas review is available before the second trial, a meritorious "evidence insufficiency" claimant would have to suffer those hardships before winning his case. *Benson v. Superior Court Department of the Trial Court of Massachusetts*, 663 F.2d 355, 359 (1st Cir. 1981). This consideration led the Supreme Court to characterize a double jeopardy ruling in a *federal* trial court as a "collateral order," allowing an immediate appeal under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977). This consideration does not settle the timing question, for Lydon

has a legitimate double jeopardy claim only if he can reverse the earlier ruling that the evidence was sufficient. And it is the timing of this latter review that is at issue. See, e.g., *United States v. Becton*, 632 F.2d 1294 (5th Cir. 1980), *cert. denied*, 454 U.S. 837, 102 S.Ct. 141, 70 L.Ed.2d 117 (1981). Nonetheless, this factor argues in favor of speedy habeas review.

For another thing, all state remedies on the evidence sufficiency claim have been exhausted, thus satisfying the explicit exhaustion requirement of § 2254 and the similar implicit requirement of § 2241. *See Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 490, 93 S.Ct. 1123, 1127, 35 L.Ed.2d 443 (1972). None of the state courts to which Lydon brought his claim actually ruled on the sufficiency of the evidence, and, under the theory announced by the Massachusetts Supreme Judicial Court, the first-tier judge's determination that the evidence *was* sufficient will never be reviewed anywhere within the Massachusetts system. *See Lydon v. Commonwealth*, 381 Mass. at ____, 409 N.E.2d at 752.

Moreover, we are aware of no "independent and adequate state ground" now barring review. *Jackson v. Virginia*, 443 U.S. at 321, 99 S.Ct. at 2790. *See Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Fay v. Noia*, 372 U.S. 391, 430-34, 83 S.Ct. 822, 844-45, 9 L.Ed.2d 837 (1963). Indeed, Lydon's conviction at the second trial would not, we should think, bar a federal habeas court from examining the sufficiency of the evidence at the first trial. *Cf. Fay v. Noia*, 372 U.S. at 433-34, 83 S.Ct. at 846. *Jackson* mandates a federal "evidence sufficiency" examination; and, as we shall discuss further in Part IV below, *Burks* invalidates a second trial where the first conviction rests upon insufficient evidence.

Further, Massachusetts has not sought to postpone habeas review until after the second trial. Rather, the Supreme Judicial Court delayed Lydon's retrial while it considered his double jeopardy claim. The Commonwealth did not attempt to proceed with the second trial pending resolution of Lydon's federal claim. It has not argued that a speedy retrial is important.

Finally, in principal we deal here with habeas review where there is no state appellate review. In principle, habeas then involves only one set of review procedures. Since most states typically provide one such review procedure prior to a retrial — where, for example, a defendant appeals a conviction — the additional delay that habeas may bring here is likely to be no greater than in the typical state case with state appellate review before retrial.

At the same time, we note two factors that militate against allowing habeas review prior to retrial. First, were such review generally available, it might create practical problems when a defendant convicted in a state court appeals, alleging "evidence insufficiency" as one of a number of grounds for reversal. The state appellate courts may well reject the "evidence insufficiency" claim, yet order a retrial on other grounds. Can the defendant in such a case then force the state to run the gauntlet of federal habeas proceedings on the "evidence insufficiency" issue prior to his state retrial? Can he obtain delay of the retrial, regardless of the merits of his claim, and thereby, through elapsed time and fragile memory, reduce his chances of subsequent conviction?

Second, to hold that defendants generally seek federal habeas "evidence insufficiency" review prior to a state retrial may seem anomalous when contrasted with Fourth, Fifth and Ninth Circuit cases denying a *federal* defendant appellate review of a similar claim prior to federal retrial. *United States v. Ellis*, 646 F.2d 132 (4th Cir. 1981); *United States v. Rey*,

641 F.2d 222 (5th Cir.), *cert. denied*, 454 U.S. 861, 102 S.Ct. 318, 70 L.Ed.2d 160 (1981); *United States v. Becton, supra*; *United States v. Carnes*, 618 F.2d 68 (9th Cir.), *cert. denied*, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980). In each of these cases, jury deadlock resulted in a mistrial. The defendant's motion for acquittal on the basis of the insufficiency of the evidence was denied, and a new trial was ordered. The defendant then moved to dismiss on the grounds of double jeopardy, in turn, based on a claim of "evidence insufficiency." The appellate court in each case dismissed the appeal, on the grounds that it was interlocutory and not appealable under the collateral order exception to the finality rule. The essence of the court's position was that the defendant was merely appealing the trial court's decision that the evidence *was* constitutionally sufficient. Such an issue, each court held, was not "collateral" under the *Cohen/Abney* test; but rather was directly involved in the merits of the case. Therefore, the appellate court would not review that decision, even to reach the double jeopardy issue. There are other circuits taking a different view. *See United States v. McQuilkin*, 673 F.2d 681 (3d Cir. 1982) (interlocutory appeal on "evidence insufficiency" allowed in federal case); *Delk v. Atkinson*, 665 F.2d 90 (6th Cir. 1981) (habeas review of evidence insufficiency allowed prior to state retrial). We do not choose between the views of the fourth, Fifth and Ninth Circuits on the one hand, and the Third and Sixth on the other. Rather, we simply note that it would be odd if, under the view of most circuits, a federal defendant were denied interlocutory appeal, while a state defendant was entitled to receive federal habeas review before his retrial.

While we recognize the force of these latter two sets of arguments, we do not find them determinative here. For one thing, the practical problem of interfering with ongoing state proceedings might be mitigated through wise use of the habeas

corpus court's power to stay those proceedings, *see* 22 U.S.C. § 2251, reserving use of that power for those cases that present a strong showing of likely success on the merits, and otherwise taking appropriate account of the "comity" principles discussed in *Younger* v. *Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Compare Robinson v. Wade*, 686 F.2d 298, 302-03 n. 7 (5th Cir. 1982), and *Baker v. Metcalf*, 633 F.2d 1198, 1200 n. 3 (5th Cir.), *cert. denied*, 451 U.S. 974, 101 S.Ct. 2055, 68 L.Ed.2d 354 (1981), *with Stevens v. Circuit Court of Milwaukee County*, *supra*, and *Sparks v. Garrison*, 446 F.Supp. 649 (M.D.N.C. 1978), *aff'd* 612 F.2d 1310 (4th Cir. 1979). Insofar as the habeas court takes account of the need for speedy retrials, the sense of anomaly with the federal "interlocutory appeal" cases (which themselves rest on the need for workable procedures) is diminished.

For another thing, the case before us is one in which, for reasons previously set out, the need for postponement of habeas review is minimal. We therefore restrict our holding to such a case. We conclude that habeas review of "evidence insufficiency" was proper at this time in the case before us. But, we specifically decline to extend our holding to other cases not characterized by the several factors favoring review listed here. We postpone to another day any authoritative decision about "habeas timing" in such other cases.

III

[4] The district court reviewed the record and concluded that the evidence was, in fact, insufficient. The Commonwealth's complaint alleged that Lydon possessed implements designed to break open a "depository" (here an automobile), with the intent to steal money or property from it, in violation of Mass.Gen.Laws ch. 266, § 49. The evidence at trial was as

follows. A plainclothes police officer testified that late one night he observed the defendant and another man in the process of breaking into the right front window of a car. When the two had opened the car, both of them climbed into it. As the witness and other policemen moved in, an alarm went off in the car and both men climbed back out. On searching the defendants, the police found a bottle of whiskey. Nearby, they found a dentpuller and a screwdriver. The witness stated that the defendants had no time to take anything *from* the car. The evidence permitted an inference that the defendant intended to steal the car itself, that he intended to take it for a short ride, or that he merely intended to go to sleep in it. But under Massachusetts law, it was impossible to say that the Commonwealth had shown beyond a reasonable doubt that the defendant intended to steal money or property *from* the car.

This was the view of a Massachusetts court in an almost identical case. The court stated,

> Breaking into an automobile merely with the intent to use it is not so 'remote according to the ordinary course of events' as to allow us to discount such an intent in this case and permit the jury to conclude that there was an intent to steal from the automobile merely from the breaking.

Commonwealth v. Armenia, 4 Mass. App. Ct. 33-39, 340 N.E.2d 901, 904-05 (Mass. App. 1976) (citation omitted). Because the Commonwealth had not shown "an intent to steal *from the automobile*," the court set the jury's verdict aside.

Having examined these facts and the Massachusetts authority interpreting the statute, we must conclude that the federal district court's determination that the evidence was not constitutionally sufficient to support conviction is not erroneous. This is not to say that defendant was innocent of all crimes.

But one can be convicted only of the crime *charged*. And, as to *that* crime, an intent to steal from the automobile was not shown.

IV

Once a habeas court has decided that the evidence at Lydon's first trial was constitutionally insufficient — that no rational trier of fact could have found him guilty as charged beyond a reasonable doubt — the Double Jeopardy Clause, as interpreted in *Burks*, forbids his retrial. As classically stated:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957). In applying this purpose, the Supreme Court has attached special weight to judgments of acquittal, *Tibbs v. Florida*, 457 U.S. 31, 41, 102 S.Ct. 2211, 2218, 72 L.Ed.2d 652 (1982); *see United States v. Difrancesco*, 449 U.S. 117, 129, 101 S.Ct. 426, 433, 66 L.Ed.2d 328 (1980); *United States v. Scott*, 437 U.S. 82, 91, 98 S.Ct. 2187, 2193, 57 L.Ed.2d 65 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1354, 51 L.Ed.2d 642 (1977). "A verdict of not guilty whether rendered by the jury or directed by the trial judge, absolutely shields the defendant

from retrial." *Tibbs v. Florida*, 457 U.S. at 41, 102 S.Ct. at 2218; *see, e.g., United States v. Martin Linen Supply Co.*, 430 U.S. at 564, 97 S.Ct. at 1351; *United States v. Ball*, 163 U.S. 662, 666-71, 16 S.Ct. 1192, 1193, 41 L.Ed. 300 (1896). And, in *Burks*, the Court specifically held that a reversal of a conviction because the evidence was constitutionally insufficient has the same effect as an acquittal, for it means that no rational fact finder could have found the defendant guilty. *Burks v. United States*, 437 U.S. at 16, 98 S.Ct. at 2149; *Tibbs v. Florida*, 457 U.S. at 40-41, 102 S.Ct. at 2217-18.

The underlying rationale, explained fully in *Burks*, is that the prosecution gets one full and fair opportunity to muster its evidence. If it nonetheless produces a case "so lacking that it should not have even been submitted to the jury," then it ought not to have another opportunity to supply additional evidence.

> Since we necessarily afford absolute finality to a jury's *verdict* of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

437 U.S. at 16, 98 S.Ct. at 2149 (emphasis in original). *Tibbs v. Florida*, 457 U.S. at 40-41, 102 S.Ct. at 2317-18; *Hudson v. Louisiana*, 450 U.S. at 43, 101 S.Ct. at 972. To allow the prosecution that opportunity — to learn from the first trial and to produce a more adequate case the second time — is to allow the type of oppression the Double Jeopardy Clause was designed to guard against. *Burks v. United States*, 437 U.S. at 11, 98 S.Ct. at 2147; *Green v. United States*, *supra*.

Where "evidence insufficiency" is found, the reasons that typically allow retrial when an appellate court finds trial error are not present. As the Court explained in *Burks*,

reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, *e.g.*, incorrect receipt or rejection of evidence. . . . When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. . . .

The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.

Burks v. United States, 437 U.S. at 15-16, 98 S.Ct. at 2149 (footnote omitted).

We have quoted at some length from the Supreme Court's recent double jeopardy cases because both the Court's language in these cases and the rationale that it embodies make clear that the Double Jeopardy Clause forbids retrial here. The prosecution had a full and fair opportunity to present its evidence. The evidence was such that no rational trier of fact could have found Lydon guilty of the crime charged. Had the trier of fact acquitted Lydon, Massachusetts law would have barred his retrial. The process of judicial review has conveniently pinpointed the evidence which was lacking, and retrial simply gives the prosecutor another opportunity to supply it. In these respects, it is difficult to see any significant difference between this case and the situation in *Burks* of a trial followed by appellate reversal for insufficient evidence.

The Supreme Court has twice rejected double jeopardy attacks on the constitutionality of the Massachusetts, and other similar two-tier systems. However, neither of these cases affect our conclusion here. *Colton v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), concerned the question of the state's power to impose an enhanced sentence at the second trial; it is not directly relevant to the issue before us. *Ludwig*, decided prior to *Burks*, holds that, as a general matter, the Double Jeopardy Clause does not forbid the retrial *de novo* of one previously convicted. Its reasoning, however, supports a finding of *unconstitutionality* here.

The *Ludwig* Court reached its conclusion primarily by drawing a parallel between a "two-tier" defendant seeking a new trial after conviction, and an ordinary convicted defendant seeking a new trial on appeal. The Court wrote in 1975:

> The Massachusetts system presents no danger of prosecution after an accused has been pardoned; nor is there any doubt that acquittal at the first tier precludes reprosecution. Instead, the argument appears to be that because the appellant has been placed once in jeopardy and convicted, the State may not retry him when he informs the trial court of his decision to "appeal" and to secure a trial *de novo*.
>
> Appellant's argument is without substance. The decision to secure a new trial rests with the accused alone. A defendant who elects to be tried *de novo* in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these circumstances, it has long been clear that a State may reprosecute. *United States v. Ball*, 163 U.S. 662 [16 S.Ct. 1192, 41 L.Ed. 300] (1896). the only difference between an appeal on the record and

> an appeal resulting automatically in a new trial is that a convicted defendant in Massachusetts may obtain a "reversal" and a new trial without assignment of error in the proceedings of the first trial.

427 U.S. at 631-32, 96 S.Ct. at 2788. This parallel between the "two-tier" trial and the ordinary trial plus appeal supported the Massachusetts system's constitutionality *prior* to *Burks*. But *Burks* carved out an exception to the rule that retrial is permissible. Since *Burks* requires release when the evidence was constitutionally insufficient at the first trial, given the analogy upon which *Ludwig* rested, *Ludwig* requires the same result within the two-tier system.

The single respect in which this case differs from both *Ludwig* and the ordinary instance considered in *Burks* is that, under the modification made in the Court Reorganization Act of 1978, a defendant now may freely choose whether to subject himself to the system's first tier. If he wishes, he can proceed directly to the second. The Massachusetts Supreme Judicial Court believed this fact critical. It apparently felt that a defendant who had voluntarily chosen to subject himself to the first tier thereby waived whatever rights he may have had to any relief other than a new trial. Such a waiver would be reasonable in light of the unusual benefit the system grants him, namely a new trial for the asking.

[5] While we agree that it would be reasonable to waive a *Burks*-type right to obtain this benefit, we do not agree that the defendant did so here. It is clear, that where constitutional rights are at issue, there must be an "intentional relinquishment of a known right or privilege" before they can be waived. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). Although prior to *Burks* the existence of a constitutional right may have been in doubt after that case, it is apparent that the harm at issue — the prose-

cutor's second chance to supply constitutionally sufficient evidence — has a constitutional dimension. And *Burks* itself indicates that a waiver of the defendant's right to avoid that harm is not to be implied lightly. That case specifically denied that a defendant's decision to seek a new trial on appeal automatically waived his right (if the evidence proved insufficient) to avoid a new trial altogether.

[6] There was no intentional relinquishment of the right at issue in this case. There is no indication that the defendant clearly understood he was waiving any right to potential freedom from retrial; to the contrary, if anything, he believed that the state could not retry him again should the evidence at the first trial prove constitutionally sufficient. And, he has vigorously asserted this claim throughout.

There is no special circumstance present here that suggests that anything less than an explicit waiver is appropriate. *Amici* argue that the district court's ruling would significantly impair the workings of the present system. But that is not so. The present system fully informs defendants of their choice and its implications for their right to a jury trial. Indeed, the trial must "be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of [trial de novo]." Mass.Gen.Laws. ch. 218, § 26A. Rule 21(A) of the Initial Rules of Criminal Procedure for the District Courts provides:

> The oral notice of right to first-instance jury trial shall include a statement to the defendant that if he or she waives this right, he or she will receive a trial before a judge and if not satisfied with the results of that trial will be able to appeal for a new trial before a jury.

The Massachusetts Supreme Judicial Court has itself suggested that consideration "be given to enlarging the consent form

so that the defendant acknowledges that his only avenue of relief from any error in the bench trial is a trial de novo." *Lydon v. Commonwealth*, 381 Mass. at ____ n. 13, 409 N.E.2d at 751 n. 13. We see no reason to indulge in the legal fiction of "implied consent" or "constructive waiver" when the reality could be so readily obtained. A fully informed defendant could proceed to a full, ordinary single level jury trial if he did not choose to waive the right here at issue. It may be that many defendants would waive the *Burks*-type right, for it would come into play only in a very limited circumstance, namely, when a first-tier judge wrongly concludes that the evidence was constitutionally sufficient to convict and a later court rev -ses the ruling. But, whether or not to waive is a decision that an informed defendant ought to make.

[7] For these reasons, we believe that the district court properly issued a writ of habeas corpus. We note the Commonwealth's argument that the district court lacks the additional power specifically to enjoin a second trial. But, rather than explore the merits of this technical questioin of law, we shall simply follow the path of the court in *Delk v. Atkinson*, 498 F.Supp. 1282 (M.D. Tenn. 1980), *rev'd on other grounds*, 665 F.2d 90 (6th Cir. 1981) which found it "unnecessary to order specific injunctive relief barring state retrial . . ., because the Court assumes that the State will act in good faith in light of the Court's decision and dismiss the charges against the petitioner." 498 F.Supp. at 1284. The appropriate relief is simply issuance of the writ providing Lydon his freedom from being required to answer any summons to a second trial. We have no reason to believe the Commonwealth will seek to retry him unless this decision is reversed.

Affirmed.

LEVIN H. CAMPBELL, Circuit Judge (dissenting).

The court may be right. Certainly Judge Breyer's opinion deals scrupulously with the issues, and I do not question the intelligence and logic reflected in my colleagues' decision. Yet I see this as one of those cases where the relentless application of secondary precepts developed in other, very different settings leads ultimately to a foolish and wrong result — a result not dictated by the Constitution, and one which has the unfortunate effect of undermining a useful and fair state procedure.

My colleagues are sensitive to the latter problem. The court's opinion reflects its deep concern over the harm to the Massachusetts two-tier system which may now occur, as a result of our judgment, from frivolous petitions and appeals alleging insufficiency of evidence and double jeopardy. Whether there are ways around this, through more elaborate waiver forms or other mechanisms, I do not know. I do know that the Massachusetts system is likely to become more costly and less coherent as a result of our decision — at a time when virtually every commentator, including the Chief Justice of the United States, is decrying the diminishing ability of both state and federal judicial systems to cope with the caseload. Moreover, I fear that decisions such as this reflect an ongoing, perhaps irreversible tendency of federal courts to treat subsidiary principles announced in constitutional decisions as if they were propositions of plane geometry, and to extend and apply them rigidly, with the unfortunate result that healthy experimentation and diversity at state and local levels is made increasingly less possible.

Here, building on *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), our court interrupts the practical functioning of Massachusetts' two-tier system — a fair and useful system which the state offers as an elective option to criminal defendants charged with misdemeanors and lesser felonies. In *Burks*, the Court held that the double jeopardy clause prohibits a second trial following the reversal of a

conviction obtained with insufficient evidence. Here, we fasten on the fact that a defendant *convicted* at a first-tier bench trial has no way to avoid a second-tier trial if he wishes to challenge the state's case either on the facts or the law: thus he must be "tried again" even if the earlier proceeding at which he was convicted was lacking in sufficient evidence. To avoid this, we insist that he and other first-tier convicted defendants must be allowed to raise their insufficiency claims before the second trial so they can be discharged if they prevail. We thus throw a substantial monkey wrench in the two-tier system whose distinguishing feature and, indeed, supreme virtue is that it offers a second *trial*, not an appeal on the law.

I would contend that the reasonable way to analyze the double jeopardy issue in this case is to look at the Massachusetts system as a whole, not in isolated fragments. If this is done, I see little ground for serious concern that the policy underlying the double jeopardy clause is being offended.

To begin with, the two-tier system was not imposed on the defendant. Massachusetts defendants may elect to receive an initial jury trial followed by a conventional appeal. There is thus no issue of Massachusetts *forcing* Lydon to accept a system which provides, in the second state, for a de novo trial rather than a conventional appeal.

Second, the two-tier procedure Lydon elected affords all the most basic double jeopardy protection that would be afforded in a more conventional system. As Massachusetts has long recognized, a judgment of *acquittal* at the first tier precludes later prosecution at the second level. And it is well established that trial de novo following a first-tier conviction does not ordinarily offend the double jeopardy clause. *Ludwig v. Massachusetts*, 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976).

Third, the two-tier system affords distinct benefits to a criminal defendant not present in the more conventional sys-

tem. These benefits flow from the very same aspect of the system which Lydon criticizes. Under the two-tier system, a defendant receives two full opportunities to be acquitted *on the facts*. The conventional American criminal system, unlike that in some European countries, permits virtually no appellate review of factual determinations. The opportunities now afforded to suppress evidence on legal and constitutional grounds do not help on this score: indeed, the most worrisome ground for a possible miscarriage of justice — misidentification by a witness — remains largely untouched by the jurisprudence of the past generation. The Massachusetts two-tier system, however, allows the possibly innocent defendant two opportunities for acquittal on the facts. This is a benefit of no small dimension. For defendants generally, it is far more meaningful than retaining a right to appeal from the first trial on grounds of insufficient evidence. In foregoing the latter, convicted defendants gain the right not to be convicted finally unless the prosecution *twice* proves their guilt beyond a reasonable doubt.

Fourth, while the de novo trial allows the prosecution to put in a different and perhaps stronger case, the same is of course true for the defendant. Bearing in mind that, in the usual case, the first-tier court can be expected to acquit where the evidence is insufficient, it will be the rare case where a convicted defendant with a valid insufficiency claim is forced to stand trial for a second time. The far more usual case will be that of the defendant convicted at the first tier on legally sufficient (if factually close) evidence. Under the Massachusetts sytem, that defendant gets the distinct benefit of a brand new trial, in which he has all the tactical benefits of knowing the prosecution's case and shifting his defenses to meet it.

Fifth, in the rare case of someone like Lydon who was convicted at the first tier on insufficient evidence, the defendant has no lack of opportunities for later vindication: first, he

may be acquitted on motion after the prosecution puts in its case in the de novo trial, assuming the judge feels the prosecution's evidence is insufficient. Second, the jury may acquit him at the second trial. Third, he may later win on an insufficiency claim relative to the second trial in a Massachusetts appellate court. While technically he is "tried again", the second stage proceeding can be regarded as but an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings during which, sooner, or later, a defendant receives more — rather than less — of the process normally extended to criminal defendants in this nation. To deny a state the right so to structure its optional criminal process is to approach saying that the Constitution imposes for all time a single model of criminal process.

Sixth, Lydon argues that the second-tier trial is unfair because it allows the prosecution to improve on its case — to put in more evidence. As noted, any disadvantage would seem to be more than outweighed by the advantage to most defendants of being able to improve on their defense in the second trial. But beyond this, the likelihood of the prosecution's obtaining additional evidence would seem slight. The prosecution has every incentive to put in its best evidence in the first tier. If it does not, and acquittal results, it can never proceed again. Moreover, the stronger the showing the more likely the defense is to accept a first-round conviction as final, without seeking a de novo trial. It follows that appellate review of the second conviction will commonly provide an effective remedy in the rare instance in which both trial courts and the jury improperly assess the sufficiency of the evidence. With these safeguards in place, there is every reason to believe that the two-tier system — if permitted to function without interruption — will vindicate claims of evidentiary insufficiency.

Lydon's predicament illustrates the point. The court concludes that the evidence introduced at Lydon's trial failed to

pass muster under the rule of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Yet the two-tier system, were it permitted to run its course, would surely correct the error. Of course, part of the process involves Lydon's submission to a second trial. But the second trial typically poses little threat that the Commonwealth will present new, more substantial evidence; indeed, a review of the record suggests that there is probably no effective way to supply evidence of intent. And even if this were to occur in isolated cases, the result is hardly so unfair, when weighed against the system's countervailing benefits to defendants as a whole, as to warrant restructuring the whole system.

Finally, I return to the point first made — that the two-tier system was not imposed on Lydon. Lydon's submission to a second trial is part of the bargain he struck with the Commonwealth when he chose the two-tier system with its distinct advantages as well as this one disadvantage. The Commonwealth requires a defendant who wishes to be tried in the two-tier system to sign a written waiver of his right to trial by jury. At the time Lydon signed the waiver he was represented — as the Commonwealth requires[1] — by an attorney whose competence is undisputed. Any attorney, and indeed most clients, would know that in choosing the two-tier system, a defendant surrenders his right to challenge legal errors committed in the initial proceeding; in place of this right, he obtains the more important right to require a trial de novo, after which, of course, there is the conventional appellate process. *See Mann v. Commonwealth*, 359 Mass. 661, 664, 271 N.E.2d 331, 333-34 (1971). Lydon has never asserted that he lacked knowledge of the limited right of appeal in the two-tier sys-

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[1] The Commonwealth requires defendants to be represented by counsel at the time they choose the two-tier system unless they have waived the right to counsel. *See* Mass.Gen.Laws ch. 218, § 26A.

tem. Thus, we may assume that he had a sufficient practical understanding of the consequences of his choice.

> Thi court nonetheless holds that Lydon's intelligent, informed decision to be tried in the two-tier system did not constitute a waiver of his right to challenge the sufficiency of the evidence at his bench trial. The court does not conclude that the right is so fundamental as to defy any form of waiver. Rather it holds that Lydon's decision did not constitute an "intentional relinquishment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). In so concluding, the court implies that a written waiver of the right would pass constitutional muster.

Thus, the court invites the Commonwealth to adopt a procedure that insofar as I can determine, would have no practical impact on a defendant's choice of the two-tier system. Under the suggested written waiver procedures, a defendant would rely heavily on the advice and expertise of his attorney in deciding whether to waive his right to challenge evidentiary sufficiency. In making this strategic choice, the attorney would be called on to weigh precisely the same factors that Lydon's attorney presumably weighed in this case. The effect of the present opinion is to create the possibility of a host of new technicalities which may vitiate the practical usefulness of the de novo system. I would hold Lydon to the consequences of his choice.

In conclusion, I fear that the court's decision is a further step in locking the states into rigid, formalistic criminal procedures, without regard to the actual justice or injustice of a given system, merely to satisfy refined, logical principles derived from prior cases decided in other contexts. Such an approach provides employment for attorneys, increases the

expense of justice, and enlarges the possibility that a guilty person may get off on a technicality. It does little to advance the cause of justice. The Massachusetts two-tier system must be viewed as a whole, not forced through a strainer developed from cases dealing with a different system. If so viewed, I believe that it does not create double jeopardy. What it does do is provide a practical trial option with many advantages to both sides.

United States Court of Appeals
FOR THE FIRST CIRCUIT

No. 82-1376.

MICHAEL LYDON,
Plaintiff, Appellee,

v.

JUSTICES OF THE BOSTON MUNICIPAL COURT,
Defendants, Appellants.

JUDGMENT

Entered December 30, 1982

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/_____
DANA H. GALLUP
Clerk.

[cc: Ms. Smith and Messrs. Rossman, Callahan and Burke.]

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No. 82-1479

In the Supreme Court of the United States

October Term, 1982

Justices of the Boston Municipal Courts

Petitioners

v.

Michael Lydon,

Respondent

On Petition for Certiorari to the United States Court of Appeals

for the First Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR CERTIORARI

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No. 82-1479

In the Supreme Court of the United States
October Term, 1982

Justices of the Boston Municipal Court
Petitioners
v.
Michael Lydon
Respondent

Respondent's Opposition to Petition for Certiorari

Michael Lydon, the respondent, urges that this Court deny certiorari to review the decision of the First Circuit, reported at 698 F.2d 1 (1982).

Statement of the Cases: Omitted Facts

The petition omits a number of facts which were a part of the record in the District Court. Mr. Lydon faced a charge of possession of burglarious implements, and chose to waive his right to an initial jury trial. He was never informed that a consequence of his choice would be to permit the prosecution to convict him on inadequate evidence and then obtain an opportunity to bolster its case if he appealed for a trial de novo.

Having been convicted at his initial trial despite his claim of insufficient evidence, Mr. Lydon exercised the only option Massachusetts law gave him - a trial de novo. Before the de novo judge, Mr. Lydon moved to dismiss the case on Double Jeopardy grounds, relying on Burks v. United States, 437 U.S. 1 (1978). The motion was denied without a hearing.

Mr. Lydon continued to pursue his claim, by seeking relief from a Single Justice of the Supreme Judicial Court. The Single Justice stayed the trial and considered the Double Jeopardy question. In its brief before the Single Justice, the Commonwealth conceded that the evidence at Mr. Lydon's trial was insufficient to support a conviction. The Single Justice wrote

an opinion in which he stated "I am of the view that the evidence was not sufficient to warrant guilty findings." The opinion went on to distinguish Lydon's case from others which also raised the Double Jeopardy implication of Burks for the trial de novo system, but where the record showed the evidence to pass constitutional muster. Having reviewed the transcript of Lydon's trial and found the evidence insufficient, the Single Justice ruled that Mr. Lydon's case squarely presented the Double Jeopardy issue, which he reported to the full bench.

The Supreme Judicial Court rejected Mr. Lydon's claim in a 5-2 decision, Lydon v. Commonwealth, 409 N.E. 2d 745 cert. denied 449 U.S. 1065 (1980), accompanied by two companion cases raising similar claims which arose before the Massachusetts Court Reorgainzation Act of 1978. Gibson v. Commonwealth, 409 N.E. 2d 741 cert. denied 449 U.S. 1089 (1980); A Juvenile v. Commonwealth, 409 N.E. 2d 755 cert. denied 449 U.S. 1062 (1980). This Court denied certiorari on December 15, 1980.

The original stay which had been in effect since February 5, 1980 continued until May 12, 1981, when the Supreme Judicial Court finally issued its judgment and remanded Mr. Lydon's case for trial. The case remained dormant in the state courts, and Mr. Lydon filed a habeas corpus petition in federal court on September 10, 1982. The District Court granted the writ on April 13, 1982 and the First Circuit affirmed that decision on December 30, 1982. At no time did the Commonwealth ever request a federal court to postpone habeas review until it could conduct Mr. Lydon's second trial.

SUMMARY OF ARGUMENT

The Court of Appeals narrowly confined both the jurisdictional and substantive aspects of its decision. Therefore, this case presents an issue of such limited impact that it does not justify granting certiorari.

In allowing a habeas corpus petition to challenge a pending state criminal trial on Double Jeopardy grounds, the Court of Appeals was following a consistent line of authority including a case from this Court, Arizona v. Washington,

434 U.S. 497 (1978). The protection against Double Jeopardy is unique in requiring vindication prior to a trial. The decision was confined to cases raising such claims. Moreover, it restricted its holding to the type of unusual circumstances which Mr. Lydon presented. Mr. Lydon's claim arising from Burks v. United States, 437 U.S. 1 (1978) rested on the contention that the evidence at his initial trial was insufficient as a matter of law to support a conviction. The prosecutor in the state courts conceded this issue. Moreover, the highest state court fully considered the constitutional implications of Mr. Lydon's claim. Finally, the state's conduct throughout the course of the litigation evidenced a lack of concern for proceeding speedily with Mr. Lydon's trial de novo. The Court of Appeals weighed all of these factors in concluding that federal intervention was appropriate.

No other case holds that habeas corpus would be inappropriate under such circumstances. The cases the petition cites as conflicting with the Court of Appeals' decision simply demonstrate that habeas corpus may not be warranted when the petition presents a different type of claim than Mr. Lydon's. These decisions are consistent in their reasoning with the Court of Appeals. Other cases the petition cites arise in a context-interlocutory review - that applies a wholly different jurisdictional test than habeas corpus. They rest on a conclusion that the claim at issue is subsumed in the merits of the litigation, rather than being collateral. This distinction is irrelevant to habeas corpus jurisdiction.

As far as the substantive Double Jeopardy ruling the court rendered, its impact is extremely limited as well. The decision clearly indicated that in the future, all a state need do to avoid the problem it encountered with Mr. Lydon is to add a sentence to a waiver form, giving defendants notice that they must abandon the protection of Burks to obtain the benefit of participating in a de novo system.

Certiorari is also inappropriate because the decision is clearly correct. Even the dissenting opinion conceded the logic of the result. Burks held that the Double Jeopardy Clause prohibits a prosecutor from a second bite at the apple when the evidence at the defendant's first trial was so deficient that

no rational person could conclude that a conviction was proper. This principle lies at the heart of Double Jeopardy's protection. The state may have only one fair chance to obtain a conviction.

The Court of Appeals simply applied this proposition to the trial de novo system. This Court had already held that Double Jeopardy applies in the same way to trial de novo as it does elsewhere. Ludwig v. Massachusetts, 427 U.S. 618 (1976). Mr. Lydon's choice of participating in the de novo system did not strip him of his Double Jeopardy protection, because the record demonstrated that there was no evidence of any sort of waiver. Quite to the contrary, the most reasonable conclusion is that Mr. Lydon affirmitively intended to rely on Burks from the very beginning of his case in the state courts.

ARGUMENT

I. The Unusual Circumstances and Limited Holding of This Case Make It Inappropriate for Certiorari.

A. The decision of the Court of Appeals that federal habeas corpus intervention was proper is confined to such limited circumstances that it presents neither a departure from established policy nor a threat to the independence of state courts.

It is settled federal policy to allow pre-trial habeas corpus petitions to raise a valid double jeopardy claim against a pending state criminal case. This Court has considered the merits of just such a habeas corpus petition. Arizona v. Washington, 434 U.S. 497 (1978). Indeed, federal adjudication of these types of claims has uniformaly been approved.[1]

The decision of the Court of Appeals recognizing federal habeas corpus jurisdiction was well within this mainstream. If anything, the court's opinion limited the scope of federal intervention beyond the general rule. Judge Breyer carefully restricted the court's holding to the type of unusual circumstances which this case presented:

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1 Sedgwick v. Superior Court, 584 F.2d 1044, 1045 (D.C. Cir. 1978) cert. denied 439 U.S. 1071 (1979) Brady v. Samaha, 667 F.2d 224 (1st Cir. 1981); Drayton v. Hayes, 589 F.2d 117, 120 (2d Cir. 1979); Russo v. Superior Court, 483 F.2d 7 (3rd Cir.) cert. denied 414 U.S. 1023 (1973); Baker v. Metcalfe, 633 F.2d 1198, 1200-01 (5th Cir. 1981); cert denied 451 U.S. 974 (1982); Gully v. Kunzman, 592 F.2d 283, 287 (6th Cir.) cert. denied 442 U.S. 924 (1979); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968); Arizona v. Washington, 546 F.2d 829 (9th Cir. 1977) reversed on other grounds 434 U.S. 497 (1978).

> The case before us is one in which...the need for postponement of habeas review is minimal. We therefore restrict our holding to such a case. We conclude that habeas review...was proper at this time in the case before us. But, we specifically decline to extend our holding to other cases not characterized by the several factors favoring review listed here. We postpone to another day any authoritative decision about "habeas timing" in such other cases. Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1, 7 (1st Cir. 1982).

The decision therefore hardly presents an issue of such wide ranging importance to the proper relationship between federal and state courts that it justifies granting certiorari.

Because of the highly idiosyncratic nature of this case, the Court of Appeals' decision will not enlarge the number of state criminal defendants who can successfully seek federal habeas corpus prior to their trials in state court. The first distinguishing feature of this case that limits its impact is the nature of the constitutional violation which the habeas corpus petition presented.

Mr. Lydon's petition advanced a double jeopardy claim relying on Burks v. United States, 437 U.S. 1 (1978). The Court of Appeals in Lydon made clear that it is only the unique nature of a Double Jeopardy claim that makes pre-trial intervention appropriate. Since the Double Jeopardy clause protects a defendant from even having to undergo a second trial, see Green v. United States, 355 U.S. 184, 187-88 (1957), he must obtain relief before his retrial or suffer the very injury the Constitution prohibits. Other constitutional rights do not require as a remedy, shielding a defendant from simply participating in a criminal tiral. Cf. United States v. MacDonald, 435 U.S. 850, 860 n.7 (1978) (Double Jeopardy claims are paradigmatic).

Moreover, the Court of Appeals' decision wil not open the door to pre-trial habeas corpus jurisdiction whenever a petition merely alleges a Double Jeopardy violation. The opinion took into account the comity priniciple of Younger v. Harris, 401 U.S. 37 (1971) by

indicating that federal intervention in ongoing state proceedings should be reserved for those cases that present "a strong showing of likely success on the merits." Lydon, Supra, 698 F.2d at 6. This was just such a case.

Mr. Lydon's Double Jeopardy claim was predicated upon the allegation that the evidence at his initial trial in the state courts was insufficient as a matter of law to support a conviction. The record before the District Court established that the prosecutor in the state courts conceded that the evidence at Mr. Lydon's trial was insufficient. In addition, the proceedings in the state courts made clear that at the very least, no state court judge who considered the Double Jeopardy claim seriously questioned the conclusion that the initial trial improperly convicted Mr. Lydon.

Thus, the Court of Appeals' decision stands for the narrow proposition that only meritorious claims based on a Double Jeopardy violation warrant pre-trial habeas corpus review. Neither habeas corpus petitions raising other consitutional issues nor frivolous Double Jeopardy claims will be open to the type of federal review which the Court of Appeals held applicable to Mr. Lydon.

The second distinguishing feature of this case that limits its significance is the lack of any showing by the state of a need to postpone habeas review. The Court of Appeals took pains to point out that the Commonwealth's actions throughout the course of litigation in state and federal courts indicated that it felt there was no need for a speedy trial in the pending state criminal matter. Moreover, the Supreme Judicial Court of Massachusetts had already fully considered the merits of Mr. Lydon's Double Jeopardy claim. Thus, for a federal court to exercise its habeas corpus jurisdiction did not deprive the state courts of the opportunity to consider the constitutional issue in the first instance, nor did it delay a trial the state wanted to pursue.

Thus, viewed in context, the Court of Appeals' decision will have no significant impact on the scope of federal habeas corpus jurisdiction. Evidence of the minor effect it will have comes from the petition in this case. As Attorney General for the Commonwealth of Massachusetts, counsel for petitioners is in a position to know of every pre-trial habeas corpus case raising the same claim as Mr. Lydon. The petition is able to cite, at p.29, only two cases which have arisen after the date of the District Court decision granting Mr. Lydon habeas corpus relief. There have probably been several hundred thousand cases completed in the first tier of the Massachusetts de novo system during that time.[2] The result of Mr. Lydon's federal litigation has hardly been a floodgate. It barely qualifies as a trickle.

B. The decision of the Court of Appeals creates no conflict among the circuits on the scope of habeas corpus jurisdiction.

The Court of Appeals' decision does not conflict with any other decided federal case. The cases from the Fifth and Seventh Circuits petitioner cited as evidence of a conflict are, to the contrary, consistent with the reasoning of the court's decision.

Kolski v. Walton, 544 F.2d 762 (5th Cir. 1977), cited at p.20 of the petition, merely establishes that comity and federalism require a federal court to abstain from pre-trial habeas corpus interference with a pending state action when the petition raises a challenge to the constitutionality of the substantive state criminal statute. The opinion intimates nothing about the appropriateness of pre-trial

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2 Cf. 1981 Annual Report of the Massachusetts Trial Court, pp.28, 39 (10,231 criminal complaints disposed of in Fiscal Year 1980 in Boston Municipal Court; 478,695 criminal complaints disposed of in Fiscal Year 1980 in all other District Courts).

habeas corpus in a case raising a Double Jeopardy claim. Since a defendant can litigate a challenge to the constitutionality of a criminal statute after conviction without suffering the irreparable harm that attends a Double Jeopardy claim, Kolski is consistent with Lydon.

Stevens v. Circuit Court, 657 F.2d 946 (7th Cir. 1982), cited at p.20 of the petition, is also consistent with the principle of the Lydon decision, but simply reached a different result because of different factual circumstances. In Stevens, the petitioner based his Double Jeopardy claim on the fact that his pending state trial was barred by a prior conviction for crimes to which he had pled guilty. The Seventh Circuit withheld habeas corpus relief because even if the petitioner's Double Jeopardy claim were meritorious, he would not suffer the harm of undergoing two trials. The opinion clearly implied that had the petitioner's first conviction been after trial - as Lydon's - pre-trial habeas corpus would be appropriate. Thus, Stevens actually supports the First Circuit's conclusion.

The Court of Appeals decision also does not conflict with the cases the petition cites at page 16, dealing with the question of whether a federal defendant may take a pre-trial interlocutory appeal based on a claim that insufficient evidence at his first trial bars his retrial after the original jury failed to reach a verdict.[3]

The concept those cases applied was the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). Cohen specifically bars interlocutory review of an issue in a federal trial if it is directly implicated in the merits of the case. The concerns of the Cohen doctrine are different from

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3. United States v. Ellis, 646 F.2d 132 (4th Cir. 1981); United States v. Ray, 641 F.2d 222 (5th Cir.) cert. denied 102 Ct. 318 (1981); United States v. Becton, 632 F.2d 1294 (5th Cir. 1980), cert. denied 102 S. Ct. 141 (1981); United States v. Carnes, 618 F.2d 68 (9th Cir.) cert. denied 100 S. Ct. 3028 (1980).

those underlying habeas corpus jurisdiction.

The collateral order doctrine applies the statute limiting federal appeals to "final decisions" in light of concerns for orderly review and judicial efficiency. Habeas corpus jurisdiction depends on questions of custody, exhaustion, and comity. In the context of an interlocutory appeal, a pre-trial Double Jeopardy claim based on insufficient evidence at a previous trial for the same offense may well fall outside the Cohen exception because it raises an issue subsumed in the merits of the pending case. That conclusion, however, would not answer the jurisdictional question in a habeas corpus context, since the issue of whether a claim is collateral or goes to the merits is not relevent there. In any event, if the resolution of the split in applying the Cohen doctrine between the cases cited in the petition and the Third Circuit in United States v. McQuilken, 673 F.2d 681 (3rd Cir. 1982) is important, the Court should undertake it in a case raising the issue directly rather than one arising in only a tangentially related context.

C. The decision of the Court of Appeals applying the Double Jeopardy Principle of Burks will have little effect on the operation of trial de novo systems.

While the Court of Appeals held that Burks v. United States, 437 U.S. 1 (1978) prohibits a state from trying a defendant in the second tier of a de novo system if his conviction in the first tier was based on insufficient evidence, the decision will have little practical impact on the operation of such state courts. The opinion clearly indicated that if a state wished to conduct a de novo system without affording defendants the Double Jeopardy protection of Burks, all it need do is inform defendants before they choose to participate in the de novo process that they must first waive the right at issue.

Indeed, some Massachusetts District Courts have adopted just such a course. (An example of a waiver form used in a Massachusetts first tier court is attached to this brief as an Appendix.)

Thus, the decision will have little effect on the future operation of state de novo systems.

II. The Decision was Clearly Correct

A. The Court of Appeals properly applied Burks v. United States to the Massachusetts Trial De Novo System.

In Burks v. United States, 437 U.S. 1 (1978), the Court held that the Double Jeopardy Clause bars retrial of a defendant after his conviction was reversed on appeal if the evidence at his trial fell below the minimum demanded by Due Process to support a guilty verdict. Burks is fully applicable to prosecutions in state courts. Greene v. Massey, 437 U.S. 19 (1978). Burks is based on the proposition that "(t)he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceedings." Burks at 11. The Court has explained that this principle is essential to the protection the Clause affords. It "prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perserverance." Tibbs v. Florida, ___U.S.___ 102 S. Ct. 2211, 2218 (1982).

The same concerns exist when the prosecution seeks a forbidden second bite at the apple following an insufficient effort in the first tier of a trial de novo system. There is nothing about the trial de novo procedure which renders the Double Jeopardy Clause inoperative.

Indeed, the Court has already made clear that the same Double Jeopardy principles apply to a de novo defendant as to a defendant whose conviction is reversed by an appellate court after a review of the record. Ludwig v. Massachusetts, 427 U.S. 618, 631-32 (1976). In both situations, the Double Jeopardy Clause prevents retrial when there was insufficient evidence at the first proceeding.

The Burks principle would be an anomoly if it were confined solely to cases where an appellate court reversed a defendant's conviction, and not to other contexts raising the same question of Double Jeopardy's consequence for a retrial after an improper conviction based on insufficient evidence. The Court, in Hudson v. Louisiana, 450 U.S. 40 (1981), made clear that Burks applies in situations other than appellate reversal. In Hudson, after the defendant was convicted, the trial judge granted a motion for a new trial on the ground that the evidence was insufficient as a matter of law to sustain a conviction. This ruling called the Burks principle into play, without regard for the fact that it originated at the trial, not the appellate, level. Hudson, supra, at 45 n.6.

It is clear as well that this principle applies even if the state courts have refused to find the evidence insufficient, but a federal habeas corpus court has done so.

> Although neither Burks nor Greene specifically states that a subsequent state retrial would violate the double jeopardy clause if a federal habeas corpus court, instead of an appellate court, finds that a state conviction was based on insufficient evidence, there is no reasonable basis for concluding otherwise. It is, after all, the nature of the right, and not the nature of the reviewing court, that bars a retrial if the reviewing court finds that the original conviction was based on constitutionally deficient evidence.

Delk v. Atkinson, 498 F. Supp. 1282, 1285 (M.D. Tenn. 1980), rev'd on other grounds sub nom. Delk v. Anderson, 665 F.2d 90 (6th Cir. 1981).[4]

The Federal District Court judge in this habeas corpus case conducted his own review of the sufficiency of the evidence at Mr. Lydon's state trial. The Commonwealth has not challenged either in the First Circuit or in its petition here, his conclusion that the prosecution's case could not support a verdict of guilty under any rational view of the evidence. The District Court's determination that the prosecution failed to prove its case thus brings into play the Double Jeopardy bar of Burks.

Massachusetts cannot render meaningless the protection the Clause affords defendants simply by refusing to engage in the type of review that would reveal a Double Jeopardy violation in the first place. Since there has been a definitive judicial determination on the insufficiency of the evidence, the State may not have another opportunity to improve its position.

B. In light of the record, the Court of Appeals' conclusion that there was no waiver was clearly correct.

The Court of Appeals was clearly correct in rejecting the Commonwealth's argument that Mr. Lydon waived his rights by electing to participate in the de novo process. The right at issue is the Double Jeopardy protection of Burks, not-as the petition argues -

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4. Aside from the Sixth Circuit in Delk V. Anderson, 665 F.2d 90 (6th Cir. 1981), both the Ninth and Fifth Circuits have recognized that Burks does not depend on a prior appellate determination of evidentiary sufficiency. In United States v. Wilkinson, 601 F.2d 791 (5th Cir. 1979) and United States v. Bodey, 607 F.2d 265 (9th Cir. 1979), the courts reviewed the evidence at a defendant's first trial, after he challenged his conviction at a retrial necessitated by a hung jury. Such a review was necessary because

a right to appellate review. This Court has held that Double Jeopardy is a fundamental right which requires the exacting waiver standard of Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See Green v. United States, 355 U.S. 184, 191-92 (1957); Schneckloth v. Bustamonte, 412 U.S. 218, 238 (1973).

Waiver is a matter of federal law, and a habeas corpus court is required to determine if a valid waiver of a constitutional right occurred. See Brewer v. Williams, 430 U.S. 387, 403 (1977); Alvarez v. Estelle, 531 F.2d 1319 (5th Cir. 1976). Where a fundamental right like Double Jeopardy is at issue, the state bears the burden of proof. Brewer, supra, at 404. Here, the Commonwealth made no effort to meet this requirement.

The District Court expressly found:

> There is no evidence that Lydon had a "meaningful choice" and made a "voluntary knowing relinquishment of a right," Green v. United States, 1957, 355 U.S. 184, 191-92, 78 S. Ct. 221, 225-26, 2 L. Ed. 2d 199, in submitting initially to a bench trial since it is not clear that he appreciated that in so doing he was waiving rights protected by the double jeopardy clause.

Lydon v. Justices of the Boston Municipal Court, 536 F. Supp. 647, 651 (D. Mass. 1982).

This finding was amply justified. There was nothing in the record of the case nor any feature of the Massachusetts de novo system to support a conclusion that there was a knowing waiver. Lydon v. Commonwealth, 409 N.E. 2d 745, 754 (1980) (dissenting opinion).

This Court has established a policy that "indulge(s) every reasonable presumption against waiver." Barker v. Wingo, 407 U.S. 514, 525 (1972) (emphasis added). That alone would support the conclusion of the Court of Appeals based on this record. Aside from the presumption,

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4. Burks would bar the conviction even though there had been no determination prior to the second trial that the evidence at the first trial had been insufficient.

however, it is clear that Mr. Lydon affirmatively intended to rely on the protection of the Double Jeopardy clause in choosing a first tier trial, rather than to waive it.

The state of the law prior to the Supreme Judicial Court's Lydon opinion offered defendants in the de novo system every reason to believe that they could raise a double jeopardy challenge in the second tier of the system based on the insufficiency of the evidence at their first trials. See Casenote, 16 New England L. Rev. 303, 319 (1981). Two Superior Court judges had already accepted the contention. Id. at 320 n. 133. Three Justices of the Supreme Judicial Court considered the question important enough to be reported to the full bench for decision. Lydon v. Commonwealth, supra (reported by Justice Wilkins); Gibson v. Commonwealth, 409 N.E. 2d 741 (1980) (reported by Justice Quirico); A Juvenile v. Commonwealth, 409 N.E. 2d 755 (1980) (reported by Justice Abrams). In this context, Mr. Lydon's decision to participate in the de novo system can hardly be equated with a deliberate abandonment of the protection against double jeopardy.

The record makes clear that from the very beginning Mr. Lydon was pursuing a course of action designed to preserve and advance a constitutional claim which the state courts had not yet definitively accepted. In light of the message this Court has given defense counsel in Engle v. Isaac, U.S., 102 S. Ct. 1558(1982) concerning the need to present novel constitutional claims to state courts, it would be ironic if Mr. Lydon were held to have waived his right to present such a claim merely by putting himself in the position of having to assert it in the first place.

CONCLUSION

The dissenting opinion in the Court of Appeals began by recognizing that the majority's result may well be correct. Lydon, supra, 698 F.2d at 10 . Not only was the decision correct in a narrow logical sense, it was also correct in the sense of implementing the Double Jeopardy Clause's purpose of preventing governmental oppression. The Commonwealth of

Massachusetts should not be allowed to shore up its first attempt and try again to convict Michael Lydon. Limited in scope though it was, the Court of Appeals' decision should stand. This court should deny certiorari.

David Rossman
Director, Boston University
Defender Program
765 Commonwealth Avenue
Boston, Massachusetts
(617) 353-3131

Counsel for Respondent

APPENDIX

Commonwealth of Massachusetts
District Court Department of the Trial Court
Cambridge Division

FORTY THORNDIKE STREET, EAST CAMBRIDGE, MASSACHUSETTS 02141
617/494-4300

Waiver of Right to Initial Jury Trial

Commonwealth

vs.

_____

Complaint / No (s) _____

I have been given notice of my right to have a jury trial in the first instance. I understand this notice. I hereby waive my right to a jury trial in the first instance on the complaints listed above.

I further acknowledge and understand that in the event I am found guilty of the offense of which I stand charged, my sole recourse is a new trial before a jury for the same offense at which time the Commonwealth would not be restricted in offering the same and/or additional evidence.

By the execution of this waiver I acknowledge that I am waiving the right to assert that any re-trial would violate my constitutional right against double jeopardy.

_____ _____

Date Signature of Defendant

WITNESS:

_____ _____

Attorney for Defendant Assistant Clerk

J 25-B

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1479

Justices of the Boston Municipal Court,

Petitioners

v.

Michael Lydon,

Respondent

Certificate of Service

I, David Rossman, a member of the Bar of this Court, hereby certify that on the 4th day of April, 1983 one copy of the enclosed motion, affidavit, and response has been mailed to the Petitioner in this case, at the address below:

Barbara A.K. Smith
Office of Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

David Rossman
Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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No. 82-1479

Justices of the Boston
Municipal Court, Petitioners

v.

Michael Lydon, Respondent

MOTION FOR LEAVE TO PROCEED BEFORE THE UNITED STATES SUPREME COURT IN FORMA PAUPERIS, WITHOUT BEING REQUIRED TO PREPAY COSTS OR FEES

Pursuant to Rule 46 of the Rules of the United States Supreme Court, motion is made by Michael Lydon, Respondent, to proceed in forma pauperis, for the reasons stated in the attached affidavit.

Respectfully submitted,

David Rossman
Counsel for Respondent
Director, Boston University Defender Program
Boston University Law School
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-3131

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-1479

The Justices of the Boston Municipal Court

Petitioners,

v

Michael Lydon

Respondent

AFFIDAVIT

I, Michael Lydon, respondent in the above-captioned matter, swear, in support of my Motion for Leave to Proceed Without Being Required to Prepay Costs or Fees:

1. I am an indigent person, having no savings or assets and earning only $130.00 - TAXES per week to support myself and my family.

2. Because of my poverty I am unable to pay the costs of this case or to give any security therefor.

3. I believe in good faith that I am entitled to the relief and redress that I am seeking in this case.

4. The nature of this action is briefly stated as follows: I was sentenced to the Massachusetts Correctional Institution for a term of two years after being found guilty in a bench trial in the Boston Municipal Court. That trial occurred in the first tier of Massachusetts' two tier system. My claim is that the conviction was based on insufficient evidence because the Commonwealth failed to present any evidence on an element of the charge. Since I was entitled to an acquittal and did not receive one I requested a new trial before the second tier, (a de novo trial). I then filed a motion to dismiss the case because a

second trial would violate my rights under the Double Jeopardy Clause. I based this claim on this Court's decision in Burks v. United States, 437 U.S. 1 (1978). After the Massachusetts Supreme Judicial Court rejected my claim, I filed a petition for a writ of habeas corpus. The District Court granted the writ and the Court of Appeals affirmed. From this judgment the Commonwealth has sought a writ of certiorari.

5. On October 31, 1979 I was found by the Boston Municipal Court to be indigent. At that time Ms. Bonnie Hannon, a third year law student practicing under the supervision of Eva S. Nilsen of the Boston University Defender Program, was appointed by the Court to represent me.

6. On September 10, 1981 I was found indigent by the United States District Court for the District of Massachusetts, and permitted to file my habeas corpus petition in forma pauperis.

Under the pains and penalties of perjury the foregoing facts are true as stated to the best of my knowledge and belief.

Respectfully submitted,

Michael T. Lydon

Dated: March 30, 1983

Michael Lydon
Respondent

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82-1479

Justices of the Boston Municipal Court,

Petitioners

v.

Michael Lydon, Respondent

AFFIDAVIT

Pursuant to Rule 28.2 of the Rules of the United States Supreme Court, under the pains and penalties of perjury, I hereby swear that the following facts are true:

1. I am a member of the bar of this Court.

2. The enclosed Opposition to Petition for Certiorari, Motion for Leave to Proceed In Forma Pauperis and Affidavit, were hand delivered by me on Monday, April 4, 1983, a t approximately 4:00 P.M. to the United States Post Office at Boston University Station, Commonwealth Avenue, Boston, Massachusetts, 02215.

3. These documents were addressed to the Clerk's Office, Supreme Court, Washington, D.C. 20543 and were mailed first class, postage prepaid.

Respectfully submitted,

David Rossman

David Rossman
Counsel for Respondent
Director, Boston University Defender Program
Boston University Law School
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-3131

Valerie M. Muehleland
Notary Public
My Comm. Exp. Oct. 25 1985

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 82-1479

THE JUSTICES OF THE BOSTON
MUNICIPAL COURT,
Petitioners,

v.

MICHAEL LYDON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

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QUESTIONS PRESENTED

I. Whether a federal court may grant habeas corpus relief to an individual free on personal recognizance prior to a trial *de novo*?

II. Whether a federal court may sit as a court of appellate review to determine the sufficiency of evidence adduced at a bench trial where the state provides for a trial *de novo* as the sole remedy for anyone dissatisfied with the result of a bench trial which a defendant has chosen voluntarily in the first instance?

III. Whether *Burks* v. *United States*, 437 U.S. 1 (1978), has application to the trial *de novo* system?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 82-1479

THE JUSTICES OF THE BOSTON
MUNICIPAL COURT,
Petitioners,

v.

MICHAEL LYDON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE PETITIONERS

OPINIONS BELOW.

The opinion of the Court of Appeals, Lydon v. Justices of The Boston Municipal Court, is reported at 698 F.2d 1 (1st Cir. 1982). The opinion of the District Court, Lydon v. Justices of the Boston Municipal Court, is reported at

536 F.Supp. 647 (D. Mass. 1982). The decision of the Supreme Judicial Court of the Commonwealth, Lydon v. Commonwealth, is reported at 381 Mass. 356, 409 N.E.2d 745 (1980).

JURISDICTION.

The judgment of the court below was issued on December 30, 1982. Issuance of the mandate was stayed, on motion, pending the filing of a petition for writ of certiorari. The petition for writ of certiorari was filed on March 4, 1983, and was granted on June 27, 1983. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOKED

FIFTH AMENDMENT.

"[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...."

FOURTEENTH AMENDMENT.

"...[N]or shall any state deprive any person of life, liberty or property without due process of law...."

STATEMENT OF THE CASE.

Michael Lydon was complained of, in the Boston Municipal Court, for possession of burglarious implements and breaking and entering a motor vehicle with the intent to commit a misdemeanor (Joint Appendix, 1a).[1/] Although he had a right to a jury trial in the first instance, he elected a bench trial, preserving his right to a subsequent jury trial if dissatisfied with the results of the bench trial.[2/]

1/ Hereinafter "J.A.".

2/ Mass. Gen. Laws c. 218, §§26, 26A.

At the close of evidence at the bench trial, counsel for Lydon argued that the Commonwealth had failed to introduce sufficient evidence on an element of the crime. A guilty verdict was entered. Lydon then claimed his right to trial by a jury of six. Prior to the jury trial, he moved to dismiss the complaint, alleging that the evidence at the bench trial had been insufficient to support conviction. The motion was denied. (J.A. 1a).

Lydon then sought extraordinary relief pursuant to Mass. Gen. Laws c. 211, §3. The jury trial was stayed and two questions were reported to the

Supreme Judicial Court of Massachusetts.[3/]

The majority of the Supreme Judicial Court found the double jeopardy claim to be without merit and further found that a jury trial judge would have no occasion to consider the sufficiency of

---

3/1. "Is it a denial of a defendant's right not to be placed in double jeopardy to require him to go through a jury trial, requested by him without waiving his rights, when the evidence at the bench trial was insufficient to warrant a conviction?"

2. "Assuming that a jury trial in such an instance would be a denial of defendant's right not be be placed in double jeopardy, may the issue of the sufficiency of the evidence at the bench trial be considered again at the trial court level, assuming, of course, that the judge at the bench trial had denied an appropriate request for a ruling that the evidence at the bench trial was insufficient?" (J.A. 20a).

the evidence at the bench trial. Lydon v. Commonwealth, 381 Mass. 356, 367 (1980). (J.A. 47a).

Lydon filed a petition for writ of certiorari which was denied. 449 U.S. 1065 (1980).

A petition for writ of habeas corpus was then filed in the Federal District Court for the District of Massachusetts. (J.A. 21a). The respondents below moved to dismiss on the grounds that the court lacked jurisdiction, that the petition failed to state a claim upon which relief could be granted and that petitioner had failed to exhaust state remedies. (J.A. 32a). The court denied respondents' motion to dismiss and ordered that the petition be granted, that the petitioner be released on personal recognizance and that he not be retried. (J.A. 35a).

The order of the district court was stayed pending appeal.

The Court of Appeals affirmed the judgment and granted the following relief:

> "The appropriate relief is simply issuance of the writ providing Lydon his freedom from being required to answer any summons to a second trial. We have no reason to believe the Commonwealth will seek to retry him unless the decision is reversed. Lydon v. The Justices of the Boston Municipal Court, 698 F. 2d 1, 10 (1st Cir. 1982) (J.A. 81A).

SUMMARY OF THE ARGUMENT.

The Massachusetts trial de novo system, applicable to lesser offenses, permits a defendant to choose a bench trial in the first instance with a right to a de novo six-man jury trial if he is dissatisfied with the outcome, or, he may choose a first instance jury trial with full appellate rights following

conviction. In the instant case respondent opted for the former procedure and then obtained federal habeas relief from the de novo trial on the ground that his conviction at the bench trial was based on insufficient evidence and therefore the double jeopardy protections enunciated in Burks v. United States, 437 U.S. 1 (1978) would preclude a de novo trial.

The petitioners maintain that the Court below erred in granting pre-trial habeas corpus relief to respondent. The respondent, free on personal recognizance prior to a de novo trial he claimed, was not under sufficient restraint to be deemed to be "in custody" for the purpose of claiming jurisdiction under 28 U.S.C. §2241. Nor, having "wiped out" the judgment against him at a bench trial by his

claim of a de novo trial, was the respondent "in custody pursuant to a judgment of a state court," so as to satisfy the jurisdictional prerequisites of 28 U.S.C. §2254.

There is no authority for the proposition that a federal court has jurisdiction to exercise pre-trial habeas review of evidentiary sufficiency claims arising out of state criminal proceedings. Only by extrapolating constitutional principles from quite dissimilar contexts could the court below create a framework by which it could interject itself into the criminal procedures of Massachusetts. Moreover, even if a technical basis for exercising jurisdiction existed, the court below abused its discretion and principles of comity and federalism by granting the

relief in question, i.e. effectively enjoining a state prosecution.

The instant petition for writ of habeas corpus does not present a colorable claim of double jeopardy violation. It presents, in fact, only a claim that the bench trial conviction was based on evidence insufficient as a matter of law to support conviction. As such it is analogous to similar claims within the federal system wherein a jury has failed to reach a verdict in a case in which the defendants motion for judgment of acquittal has been denied. After a mistrial has been declared, the majority of the circuits will not permit interlocutory appeal of the sufficiency issue prior to a second trial. Yet, the court below, in misplaced reliance on Abney v. United States, 431 U.S. 651 (1977), and Jackson v. Virginia, 443

U.S. 307 (1979), has held that the federal court may review such a claim arising in a state trial. However, Abney presented a perfected and colorable claim of double jeopardy within the framework of federal appellate review. The case did not involve the issue of collateral habeas review. Jackson on the other hand, dealt solely with the standard to be applied when a federal court had jurisdiction under §2254 to review, postconviction, a sufficiency of the evidence claim.

Finally, it is submitted, Burks v. United States, supra has no application where the Commonwealth does not provide appellate review of bench trials for any type of claim of error, but does provide for a de novo trial if an individual is dissatisfied with the outcome of the

bench trial he has freely chosen in the first instance.

ARGUMENT

I. THE PETITION FOR WRIT OF HABEAS CORPUS DID NOT SATISFY THE JURISDICTIONAL REQUIREMENTS UNDER EITHER 28 U.S.C. §2241 OR §2254

INTRODUCTION

The Massachusetts Trial De Novo System

Under the Court Reorganization Act, St. 1978, c. 478, a defendant, charged with a crime over which the Boston Municipal Court and the district courts of the Commonwealth have original jurisdiction,[4/] has a right to be tried by a jury in the first instance

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4/ Those crimes include all misdemeanors, except libel, and all felonies punishable by imprisonment in the state prison for not more than five years. Mass. Gen. Laws c. 218, §26.

or he may elect an initial bench trial.[5] If the defendant elects a bench trial, he must file a written waiver of the jury trial.[6]

If a bench trial is chosen, and a defendant is dissatisfied with the outcome, his sole remedy is a trial de novo, before either a judge or jury at his election with appellate review after conviction based upon the record of the de novo trial.[7] With the claim of the de novo trial, the judgment at the bench trial is "wiped

---

5/ Mass. Gen. Laws c. 218, §26A.

6/ Id. The waiver will be received only if a defendant is represented by counsel or has filed a written waiver of counsel.

7/ Mass. Gen. Laws c. 218, §§26 and 27A; Mass. Gen. Laws c. 278, §18.

out." Mann v. Commonwealth, 359 Mass. 661 (1971). If a jury trial is chosen in the first instance, appellate review is available following conviction.[8/]

In order to appreciate fully the issues presented, a rather detailed analysis of the posture of the case before the courts of the Commonwealth and of the claim as initially raised in the federal court is required.

Contrary to respondent's continued protestations, no ruling as to the sufficiency of the evidence as a matter of law has ever been rendered in the state court. Lydon v Commonwealth, 381 Mass. 356, n.6, 361. The Supreme Judicial Court in examining whether the

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8/ Mass. Gen. Laws c. 218, §27(g).

decision in Burks v. United States, 437 U.S. 1 (1978), had application to the trial de novo system, held that it did not. The court reasoned as follows:

Burks dealt with an appellate determination that the evidence at trial was insufficient as a matter of law to warrant conviction and further held that, under those circumstances, the double jeopardy clause barred retrial. Lydon v. Commonwealth, at 361. Unlike the judicial system in which Burks was tried, the two-tier system does not provide for appellate review of alleged errors committed at a bench trial. Therefore, no court would consider the issue of the sufficiency of the evidence and Burks is inapplicable. This court in Burks, as the Supreme Judicial Court declared, simply did not consider "whether under double jeopardy

principles a defendant convicted on inadequate evidence at a bench trial has a right to reconsideration of that ruling prior to trial de novo." Id., at 361. Yet, it was the proposition that Burks required the Commonwealth to provide such an appellate procedure which Lydon urged upon the Supreme Judicial Court, and the court quite properly concluded that no such right of appeal or other review from a bench trial was constitutionally required under Griffin v. Illinois, 351 U.S. 12, 18 (1956). Id., at 363.

In accordance with the judgment of the Supreme Judicial Court, the docket entries in the Boston Municipal Court reflect a direction to the Jury Session Judge to "proceed with Trial De Novo since the defendants' request for jury

trial vacated the judgment of the bench trial". (J.A. 2a).

Prior to commencement of the jury trial he had sought, Lydon filed a petition for writ of habeas corpus in the federal district court, couching his claims in terms of a double jeopardy violation.

Claiming jurisdiction under 28 U.S.C. §§ 2241 and 2254, he alleged that further prosecution of the complaint would place him twice in jeopardy in violation of his rights under the Fifth and Fourteenth Amendments and that he had moved to dismiss in the jury session on the ground that the double jeopardy clause barred further trial because the original conviction was based on insufficient evidence as a matter of law" (J.A. 24a-25a). At no point did the petition request that the federal

court review the sufficiency of the evidence adduced at the bench trial under the due process clause. Rather, Lydon sought the writ to prevent the de novo trial, solely on the grounds of an alleged double jeopardy violation.

A. The Respondent Did Not Satisfy the Jurisdictional Requirements of 28 U.S.C. §2241.

It is not disputed that §2241 provides for the application for habeas corpus relief in a pretrial setting. However, it is equally clear that the writ "shall not extend to a prisoner unless...he is in custody..." 28 U.S.C. §2241 (c)(3).

Michael Lydon is neither a "prisoner" nor in "custody". Lydon was and is free upon personal recognizance pending a de novo trial he claimed. It is submitted that it would be difficult

to extend the normal meaning of 'prisoner' to one neither imprisoned, nor in imminent danger of imprisonment.

The court below in reliance on Hensley v. Municipal Court, 411 U.S. 345 (1973) held that Lydon was "in custody" under 28 U.S.C. §2241 and proceeded to review the sufficiency of the evidence adduced at his bench trial. It is submitted that Hensley does not support the court's finding of "custody".

First, Hensley did not hold that a person free on personal recognizance prior to trial is in "custody" for federal habeas purposes. This court held only that an individual who had been convicted and sentenced but who had been enlarged on his own recognizance under an order staying execution of sentence pending appeal was in custody for habeas purposes. The Court put

forth three basic rationales for its decision.

The Court reasoned that petitioner was subject to restraints "not shared by the public generally.... He cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobediance itself is a criminal offense." 411 U.S. at 351.

The Court further noted that petitioner remained at large only by the grace of the stay and its numerous extensions. "The State has emphatically indicated its determination to put him behind bars and the State has taken every possible step to secure that result. His incarceration is not a speculative possibility that depends on a number of contingencies over which he

has no control. This is not a case where the unfolding of events may render the entire controversy academic." Id., at 351-52. (emphasis added).

Finally, the Court concluded, "[Our] conclusion that petitioner is presently in custody does not interfere with any significant interest of the State. Even if we were [to hold] that petitioner was not in custody that result would do no more than postpone this habeas corpus action until petitioner had begun service of his sentence. Id., at 352.

Hensley is readily distinguishable. The holding applies specifically to persons released on personal recognizance following conviction, not pre-trial de novo. Moreover, Hensley involves a further stay of execution of sentence, not a stay of a trial de novo.

Personal recognizance does not constitute a 'severe' restraint on an individuals liberty, rather, it is a restraint no greater than that imposed on a witness under subpeona. Personal recognizance requires only that an individual appear at a certain time for trial.[9/] It places no limitations on his movements, nor does it subject him to demand without notice.

Moreover, while it is clear under the case law that one need not be in "physical" custody, the requisite "legal" custody must involve "significant restraint". In Jones v. Cunningham, 371 U.S. 236 (1963), holding that a prisoner released on parole was

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9/ Mass. Gen. Laws, c. 276 §65.

in custody for federal habeas purposes, the court stated:

> "While petitioner's parole releases him from immediate physical imprisonment, it imposes conditions which significantly confine and restrain his freedom; this is enough to keep him in... 'custody'...within the meaning of the habeas corpus statute...." Id., at 243.

Unlike the petitioner in Hensley, the respondent in the instant case does not face certain incarceration; indeed, this is a case "where the unfolding of events may render the entire controversy academic." Hensley, 411 U.S. at 352. In the instant case, unlike Hensley, any future incarceration is a "speculative possibility that depends on a number of contingencies..." (Hensley, at 352.), the first of which is that he be convicted. Moreover, in considering the application of the third Hensley

criterion, the federal court's conclusion that petitioner herein is "in custody" does interfere with the Commonwealth's significant interest in maintaining its two-tier system.

It is therefore submitted that the restrictions imposed by a pretrial personal recognizance are not sufficient to constitute custody for federal habeas purposes. Nor, as will be discussed infra, does this case present any extraordinary circumstances which would justify a relaxation of the "custody" requirement. It is submitted that the court below has improperly extended Hensley from a post trial setting to a pre-trial situation and has opened the door to the federal court to all persons prior to trial.

B. The Jurisdictional Prerequisites of 28 U.S.C. §2254 Have Not Been Satisfied.

The court had no jurisdiction to grant relief under 28 U.S.C. §2254 for Lydon was not "in custody pursuant to a judgment of a state court." The claim of a trial de novo "wipes out" the proceedings at the bench trial. Mann v. Commonwealth, 359 Mass. 661, 666 (1971).

Most recently the Supreme Judicial Court in a discussion of Massachusetts trial de novo procedure has re-affirmed this principle:

> "The important point is that the defendant can still appeal to the jury of six session and obtain a trial de novo. It has long been the rule that 'the appeal from the judgment of the district court vacates that judgment and renders immaterial...all...errors or irregularities in the proceeding there.' Enbinder v. Commonwealth, 368 Mass. 214, 217, cert. denied 423 S.Ct. 1024 (1975)...(citations ormitted)." Commonwealth v. Duquette, 386 Mass 834, 846-847 (1982), 438 N.E. 2d 334, 342. See

also, Commonwealth v. Curtin, 386 Mass. 587, 591 (1982), 432 N.E.2d 510.

Or, as this Court has described the de novo system:

> At the de novo trial, all issues of law and fact must be determined anew and are not affected by the initial disposition. In effect, the taking of the appeal vacates the district court or Municipal Court judgment, leaving the defendant in the position of defendants in other States which require the prosecution to present its proof before a jury." (Footnote omitted). Costarelli v. Massachusetts, 421 U.S. 193, 194 (1975).

It is important to note that Lydon voluntarily elected to seek a bench trial and to wipe out the judgment of his bench trial by claiming a de novo trial. He was under no compulsion to do so.

The principle that the claim of a trial de novo "wipes out" the judgment at the bench trial is not diminished by

the fact that if a defendant fails to appear he shall be defaulted and sentence may be imposed upon him by the court in the six-man session.[10/]

While this court has held that habeas corpus jurisdiction is not defeated by release of a prisoner prior to termination of the habeas proceeding, it has never held that the petitioner need not be 'in custody' when the application for habeas corpus is filed. Carafas v. La Vallee, 391 U.S. 234, 238 (1968). Moreover, imposition of sentence upon a default involves a totally speculative and collateral act by a defendant and, in any event, until

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10/ Mass. Gen. Laws, c. 278 §24.

that contingent future possibility occurs, Lydon is not under a "judgment".

The federal district court below assumed jurisdiction to rule on the sufficiency of the evidence adduced at Lydon's bench trial. Only section 2254(e) specifically provides for such review, subject to the jurisdictional prerequisite of "custody pursuant to the judgment of a State court". If the court had no jurisdiction under §2254 it follows logically that it had no authority to review the sufficiency of the evidence.

Therefore, it is submitted that neither of the "custody" requirements of §§2241 and 2254 have been met and the court below had no jurisdiction to grant relief.

C. The Court Below Should Not Have Exercised Jurisdiction.

Assuming, arguendo, that the jurisdictional requirement has been met, it is submitted that the court below has violated principles of comity and federalism in granting pre-trial relief.

First, the threshold issue decided by the federal court was whether sufficient evidence was introduced at the bench trial to support conviction. No state court has ever ruled on this claim. Relief from a conviction in which such an error or any other error of law has allegedly occurred is had in Massachusetts by a de novo trial. Therefore, Lydon has not sufficiently exhausted his state court remedies.

Second, the pre-trial relief afforded, effectively aborting the de novo trial, runs contrary to decisions

of this and lower federal courts. Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973), is the leading case on the propriety of a pre-trial grant of relief. In Braden,[11/] this Court granted relief to a petitioner seeking to require the state to grant him a prompt trial. The Court emphasized that the relief requested would not "abort a state proceeding or ...disrupt the orderly functioning of the state judicial processes." Id., at 491. This Court emphasized

> "...that nothing we have said would permit the derailment of a pending state proceeding by an

11/ The petitioner was incarcerated under convictions in Alabama and under a detainer lodged by Kentucky officials following indictment in that state.

attempt to litigate constitutional defenses prematurely in federal court." Id., at 493.

The First Circuit, however, has effected precisely such a result. The double jeopardy defense is indeed premature because prior to a ruling by the federal district court on the sufficiency of evidence there exists no colorable double jeopardy claim. If the defendant challenges the evidentiary sufficiency of the prosecution's case he need but go forward with the de novo trial and put the prosecution to the test. The federal court should abstain where the issue may be resolved by trial on the merits. See Atkins v. People of State Michigan, 644 F.2d 543 (6th Cir. 1981); Neville v. Cavanaugh, 611 F.2d 673 (7th Cir. 1981). Moreover, no extraordinary circumstances justifying pre-trial relief have been presented.

See Braden at 507, (Rehnquist, J., dissenting); Moore v. DeYoung, 515 F.2d 437 (3rd Cir. 1975).

Therefore, it is submitted that even if the court had jurisdiction, the grant of relief was premature and violated principles of comity and federalism.

II. THE COURT BELOW IMPROPERLY ASSUMED JURISDICTION TO REVIEW A SUFFICIENCY OF THE EVIDENCE CLAIM PRIOR TO A DE NOVO TRIAL.

A. Sufficiency of the Evidence Claims Are Not Reviewable Prior To Trial.

Although petitioner characterizes his claim as one of double jeopardy, in reality his only perfected claim is one of a denial of a motion for directed verdict or motion for acquittal. Such a claim is neither appealable under Abney v. United States, 431 U.S. 651 (1977), nor does it raise a claim at this stage cognizable in a habeas proceeding.

There has been no ruling in the state court on the sufficiency of the evidence presented at petitioner's bench trial.

> "The Single Justice did not sit as a reviewing court in determining the sufficiency of the evidence. Thus, any conclusion reached by the Single Justice on this issue was made for the purpose of reporting clearly framed questions to the full bench and is not an adjudication of the rights of the parties in this case." Lydon v. Commonwealth, 381 Mass. at 356, n.6.

> "No reviewing court has ruled on the sufficiency of the evidence at the bench trial in the present case. Under the two-tier system as it is designed to operate, no court would ever consider this issue." Id., at 361.

Therefore, the only claim actually before the federal court is that it was error for the bench trial judge to deny the motion for directed verdict or for acquittal.

An attempt to frame such a claim in terms of double jeopardy must fail.

Several circuit courts of appeal have rejected such an attempt to bring the claim prior to trial under the Abney rationale. United States v. Richardson, 702 F.2d 1079 (D.C. Cir. 1983); United States v. Ellis, 646 F.2d 132 (4th Cir. 1981); United States v. Carnes, 618 F.2d 68 (9th Cir. 1980); United States v. Rey, 641 F.2d 222 (5th Cir. 1981); United States v. Becton, 632 F.2d 1294 (5th Cir. 1980).

For example, in Ellis the defendant and co-defendant were tried together, and a mistrial was declared after the jury was deadlocked. Ellis was granted severance and the jury deadlocked at the second trial. While his appeal based upon a claim of double jeopardy was pending, Ellis then moved to dismiss on the ground that the evidence presented at the second trial was insufficient to

sustain a conviction and therefore, a retrial would place him in double jeopardy. The motion was denied in the trial court. Ellis then attempted to appeal under the Abney rule. In dismissing the appeal, the Fourth Circuit stated:

> In an effort to bring his case within the scope of Abney, Ellis has attempted to frame a completely non-collateral issue-the sufficiency of the evidence to convict him (as he has yet to be convicted, this goes directly to the merits of his case)-in terms of double jeopardy. He argues that retrial after mistrials would violate the double jeopardy prohibition if insufficient evidence for conviction had been introduced at the prior trial. In essence, he seeks to have an appellate court decide his guilt or innocence and to perform a function properly left to the trial judge, that is, determining the sufficiency of the evidence to send the case to the jury. Merely because he has chosen to characterize the issue as one of double jeopardy, however, does not require this court to review it, for Abney limited review to colorable double

> jeopardy claims. Defendants cannot be allowed to delay trials and to dislocate the orderly procedure of the courts simply by raising frivolous claims of double jeopardy. Ellis, at 134.

United States v. Becton, 632 F.2d 1294 (5th Cir. 1980), is also instructive. In Becton, the trial resulted in a deadlocked jury and a declaration of mistrial. Motions for judgment of acquittal which were made at the close of the prosecution's case and renewed after discharge of the jury were allowed in part, but denied in the main. On retrial of the remaining counts, Becton renewed the motion for acquittal and moved to dismiss on the ground of double jeopardy, alledging that the evidence submitted at the first trial had been insufficient to warrant submission of the case to the jury. The defendants attempted to appeal the

denial of the motions, arguing that Burks v. United States, 437 U.S. 1 (1978), should prevent retrial. The defendants' theory was that a hung jury should have the same legal effect as a reversal for insufficient evidence on appeal. The Fifth Circuit, however, rejected the use of the Burks rationale to provide jurisdiction under these circumstances. Noting that while under Burks a retrial would be forbidden after "a determination by the appellate judges" that evidence was insufficient,

> "[h]ere there has been no such determination of insufficiency by any court, trial or appellate. Instead we contemplate a contrary determination by the first trial court-that the evidence was sufficient to warrant submission to the jury-and a mere refusal by the jury to convict. Such a refusal is an action in no wise the necessary equivalent of a decision, even by the jury, that the evidence is insufficient to warrant submission. In the first place, of course, the jury is

neither equipped nor asked to make such a determination. In the second place, it is a commonplace that juries can refuse to convict even on substantial evidence of guilt, while, to the contrary, judges are not to acquit unless the government has clearly failed to produce evidence supporting a conviction when viewed most favorably to the prosecution. Burks, 437 U.S. at 16-17, 98 S.Ct. at 2149-2150. What the appellants seek instead, is a determination by us now on this interlocutory appeal before their retrial-that the evidence at the first trial was insufficient to warrant submission and that the trial judge erred in denying their motions for acquittal. This is new ground.

. . . . . .

Although in form the question presented here is that of denial of a motion asserting former jeopardy, in reality and in substance the appellants seek review of their motions to acquit made at the first trial. They argue that these should have been granted, since the evidence there was insufficient to support a jury submission, and that had they not been erroneously denied, no succeeding trial would have been permissible. Thus, we contemplate just such a "thinly disguised attempt to turn this [Abney]

appeal into a plenary review of his first trial" as the Second Circuit rebuffed in United States v. Klein, 582 F.2d 186, 196 (2d Cir. 1978), cert. denied, 439 U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 342 (1979). We conclude we must do likewise." United States v. Becton at 1295-1296.

The majority opinion in United States v. Richardson, 702 F.2d 1079 (D.C. Cir. 1983), follows the Fourth, Fifth, and Ninth Circuits in holding that a denial of a motion for judgment of acquittal is not reviewable under the Abney rationale. The analysis applied by the District of Columbia Circuit is the same as advanced by petitioners in the instant case.

"....Richardsons' double jeopardy claim is premised entirely on the assumption that the trial court's ruling on the sufficiency issue was erroneous...the propriety of the trial court's ruling on that issue cannot be reviewed by an appellate court at this time. Therefore, since Richardson's double jeopardy claim exists at the appellate level only if the district court's

> sufficiency of the evidence ruling is overturned, our refusal to review that ruling precludes any meaningful review of his double jeopardy claim at this time. In other words, because this court is unable to address the sufficiency issue at this time and because that issue is the only basis for Richardson' double jeopardy claim, Richardson has failed to make at this time any double jeopardy claim which can be reviewed by an appellate court." (footnotes omitted) Id., at 1083.

In the instant case Lydon presented no "colorable" double jeopardy claim to the federal court. At the time he sought federal relief his only claim was the allegedly erroneous ruling on the sufficiency issue. Thus, the federal court assumed jurisdiction solely to consider a question of the sufficiency of evidence.

As the above circuit courts have recognized, a claim disputing the sufficiency of evidence at a trial is simply not "collateral" under the rule

of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), rather it is essential to a determination of guilt or innocence, and therefore Abney does not require a different result.

Moreover, Abney concerned the construction of the term "final decision" under 28 U.S.C. §1291 and held that an interlocutory appeal of an order denying a pretrial motion to dismiss an indictment on double jeopardy grounds was permitted. The decision was concerned solely with federal appellate jurisdiction. It did not involve a jurisdictional issue in which the "potential conflict between courts of two different governments," (Radio Station WOW v. Johnson, 326 U.S. 120, 124 [1945]), necessarily implicates those principles of comity and federalism which dictate restraint from

precipitous federal involvement in state criminal proceedings. It is submitted that Abney, addressing the final judgment rule within a unitary system, has no effect on the jurisdictional requirements of §2254 or §2241(c)(3) concerning state prisoners.

While Abney does have significant constitutional overtones where a colorable claim of double jeopardy is presented prior to trial, it does not, it is submitted, lend support to the view of the First Circuit that the federal court will sit as a court of appellate review over bench trials in Massachusetts, nor does the decision in any sense require that the states provide interlocutory appellate review of evidence sufficiency questions. This is not a situation in which the Commonwealth provides for appeals to

protect some rights but not others.[12/] It is acknowledged that the Third Circuit in United States v. McQuilkin, 673 F.2d 681 (3rd Cir. 1982), (permitting interlocutory appeal of evidence insufficiency issue in federal court) and the Sixth Circuit in Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981), (permitting habeas review prior to state retrial), reached the opposite result. However, it is submitted that these cases were wrongly decided and Delk in particular is distinguishable on both practical and conceptual grounds. Delk had been convicted of murder. On direct appeal he raised the issue of the

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12/ See Spradling v. Texas, 455 U.S. 971 (1982), (Brennan, J., dissenting from denial of certiorari, at 973).

sufficiency of evidence to support his conviction. The Tennessee Supreme Court reversed for trial errors but specifically found the evidence to be sufficient. Thus, Delk had exhausted the appropriate state remedy for his claim. In the instant case, Lydon has not exhausted the provided remedy for his claim - a de novo trial; there has been no state determination of the sufficiency of evidence claim and, as a practical matter, Lydon is not faced with a protracted trial nor with the spector of a substantial term of imprisonment.[13/]

13/ Although the Boston Municipal Court has jurisdiction only over misdemeanors and lesser felonies punishable in the State prison for up to five years, the court may sentence only to the local jail or House of Correction in which the maximum term of imprisonment is two and a half years. Mass. Gen. Laws, c. 218, §27; c. 279, §3.

The Third Circuit in McQuilkan erred, it is suggested, by focusing on the nature of the right ultimately asserted, rather than the actual claim presented. As the District of Columbia Circuit points out:

> "The argument that the nature of the right involved in a double jeopardy claim requires an appellate court to immediately review all denials of double jeopardy is in reality an argument that the double jeopardy clause requires immediate appellate consideration of such claims". United States v. Richardson, at 1082, n.21.

The Third Circuit's approach therefore flies in the face of the traditional rule that there is no right to an appeal.

The First Circuit did acknowledge some anomaly in the fact that a majority of the circuits would not permit interlocutory review of a sufficiency of the evidence claim within the federal system, yet the federal court would

inject itself into a state's criminal proceeding in order to review such a claim.[14/] The petitioners submit that the First Circuit's position in this regard is not merely anomalous, but a violation of fundamental principles of comity and federalism and a failure to recognize that the Commonwealth is a coequal sovereign.

In summary, it is submitted, respondent brought no double jeopardy

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14/ The decision of the First Circuit has another curious effect on the exercise of the right to jury trial. For example, if an individual elects a first instance jury trial and questions the sufficiency of the evidence, he must pursue the normal process of review through the appellate courts of Massachusetts in order to exhaust state remedies before seeking federal relief. However, if a bench trial is chosen, under the instant decision one can go directly to the federal court for review of the sufficiency claim.

claim before the federal court; at best, he requested collateral review of a denial of a motion for directed verdict or for acquittal.[15/] There can be no dispute that the federal court on a habeas corpus action does not sit as a court of review over such matters; especially where the petitioner does not allege in his petition that he has been

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15/ It is arguable that a claim of insufficient evidence raised prior to trial does not present a federal question cognizable in a habeas petition. In Reed v. Texas, No. 80-6948, the question, "[w]hen state trial court grants new trial to the criminal defendant under sentence of death, is defendant entitled to appellate review, prior to subsequent trial, on his claims that evidence adduced at first trial was insufficient to support convicted?", was presented. This Court ordered summary dismissal "for want of a substantial federal question." 454 U.S. 805, (1981). Under Hicks v. Miranda, 422 U.S. 332, 343-354 (1975), a summary dismissal for want of a substantial federal question is a decision on the merits.

denied due process under the standard of Jackson v. Virginia, 443 U.S. 307 (1979). Nor was it proper for the federal court to interject such a theory of the case into the habeas proceeding. See Picard v. Connor, 404 U.S. 270 (1971); Turner v. Fair, 617 F.2d 7 (1st Cir. 1980).

Therefore, respondent was not in custody pursuant to a judgment of the state court, nor did his claim constitute a claim of constitutional dimension cognizable in a habeas corpus petition.

B. The Relief Granted Violates The Proper Scope of Habeas Corpus Relief.

The relief granted, ordering release from personal recognizance accompanied by an express expectation that the Commonwealth would not attempt to provide the trial de novo respondent had

requested had the practical effect of enjoining the Commonwealth from trying the respondent and exceeded the proper scope of relief to be accorded a habeas applicant. Kolski v. Walton, 544 F.2d 762 (5th Cir. 1977); United States ex rel Stevens v. Circuit Court of Milwaukee County, 675 F.2d 946 (7th Cir. 1982).

Principles of judicial restraint premised upon the doctrines of comity and federalism as enunciated in Younger v. Harris, 401 U.S. 37 (1971), require, it is submitted, that a federal court not interfere in a pending state criminal proceeding whether relief is sought by way of habeas corpus, declaratory judgment or injunction in the absence of extraordinary circumstances. In Younger v. Harris, the court held that under basic

principles of equitable restraint and the more "vital considerations of comity and federalism", federal injunctive relief was precluded in the absence of extraordinary circumstances showing a threat of irreparable injury which is both great and immediate. This policy, the court found to be grounded in basic doctrines of equity jurisprudence and

> "is reinforced by an even more vital consideration, the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the states and their institutions are left free to perform their separate functions in their seperate ways" Younger, 401 U.S. at 44.

That notions of comity and federalism have a substantial role in determining the availability of federal

habeas relief is not subject to real dispute. See Stone v. Powell, 428 U.S. 465 (1976). Since there is no practical difference in granting habeas relief from a pending state trial and enjoining that trial, the abstention hurdles should have been met in this case. However, in the instant case neither bad faith nor harrasment has been alleged. Irreparable injury is not established merely by "...the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution. Id., at 46.

A number of lower federal courts recognizing the applicability of Younger principles where habeas relief is sought prior to trial, Robinson v. Wade, 686 F.2d 298 (5th Cir. 1982), have held that a "colorable" double jeopardy claim constitutes the threat of irreparable

injury necessary to fall within the exception to Younger principles. See Jackson v. Justices of the Superior Court of Massachusetts, 549 F.2d 215, 219 (1st Cir. 1977); Gully v. Kunzman, 592 F.2d 283 (6th Cir. 1979).

Given that the double jeopardy clause protects against multiple prosecutions as well as multiple convictions, (see Abney v. United States 431 U.S. 651, 661 (1977)), the position espoused in these cases has merit. The instant case, however, did not present a colorable double jeopardy claim but merely a claim that Lydon was convicted on insufficient evidence. Moreover, as the Seventh Circuit has recognized, merely because a defendant complains about a right not to be subjected to double jeopardy that does not necessarily require that he should be

granted the extraordinary remedy of pre-trial federal habeas corpus. Stevens v. Circuit Court, supra at 948.

While the situation in Stevens differs from the instant case in that Stevens originally chose to plead guilty and hence had not undergone a first trial, it is analogous in that Lydon chose to undergo the bench trial. It was not the state, but he, who requested the second trial. Moreover, the initial proceeding in this case, as in Stevens, involved no great expenditure of time.[16/] The foregoing circumstances

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16/ The transcript of the bench trial proceeding, including the taking of evidence and argument for a required finding of not guilty, consumed only eleven pages. Transcript of the Evidence, Commonwealth v. Michael Lydon, Robert McDonald, B.M.C. Nos. 9569, 9570, 9571, 9572.

should have weighed heavily against the exercise of jurisdiction in this case.

> "This Court has long recognized that in some circumstances considerations of comity and concerns for the orderly administration of criminal justice require a federal court to forego the exercise of its habeas corpus power." Francis v. Henderson, 425 U.S. 536, 539 (1976).

On balance, it is submitted, interruption of a state criminal proceeding places a far greater burden on the orderly administration of justice than the burden placed upon the defendant in going forward with a trial he has requested.

III. THERE IS NO CONSTITUTIONAL BASIS FOR EXTENDING BURKS V. UNITED STATES, 437 U.S. 1 (1978), TO THE TRIAL DE NOVO SYSTEM.

A. Burks Is Limited In Its Application.

The precise holding in Burks v. United States, 437 U.S. 1 (1978), is

that "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient", Burks at 18.[17/] Although the federal court here dismissed petitioners' "preoccupation" with the Supreme Court's articulated requirement that a reviewing or appellate court must determine insufficiency before Burks comes into play, "as a formal nicety" Lydon v. Justices of the Boston Municipal Court, 536 F.Supp at 651 (1982), every decision on the subject which petitioners have discovered acknowledges such a requirement. Clearly, the requirement was critical to the decisions of the Fourth, Fifth, Sixth, Ninth and District

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17/ The rule is applicable to the states. Greene v. Massey, 437 U.S. 19 (1978).

of Columbia Circuits discussed above. Most recently, this Court in Tibbs v. Florida, 457 U.S. 31 (1982), holding that an appellate ruling, based upon the weight of the evidence failed to implicate the Burks decision, emphasized throughout the opinion that the Burks exception to permitting retrial after reversal is triggered "once the reviewing court has found the evidence legally insufficient" to support the conviction. Tibbs at 41. See also Bullington v. Missouri, 451 U.S. 430, 442-443 (1981).

This Court's discussion of the issue in the above cases makes quite clear that Burks has application only where a court which has jurisdiction to review the sufficiency of evidence finds that as a matter of law the evidence was insufficient to support a conviction.

Under those circumstances, retrial is forbidden,. Hudson v. Louisiana, 450 U.S. 40, 45, n.5 (1981).

Hudson v. Louisana, supra, does not render Burks applicable to the trial de novo system. In Hudson, the Louisiana Supreme Court appeared to have held that under Burks double jeopardy protections are violated only where the reviewing court has determined that the prosecution has adduced no evidence rather than found solely a lack of sufficient evidence. Id., at 43. This court reversed, holding that Burks precluded retrial after a finding by a reviewing court, be it strictly appellate or by way of a motion for new trial, that the evidence at the first trial was insufficient as a matter of law. Id., at 42-43.

Both Burks and Hudson involve a

post-conviction framework in which a procedure for "review" is established. Massachusetts does not provide for "review" of bench trials. Rather, it permits a defendant to "wipe out" or nullify the conviction by moving for a wholly new determination of guilt or innocence without the necessity of alleging any error in the bench trial proceeding. Neither Burks nor Hudson require that a state provide for a "reviewing" court. Cf. Griffin v. Illinois, 351 U.S. 12, 18 (1955).[18/]

18/ Even were this court to re-examine the constitutional right to an appeal in a proper case, it is suggested that the Massachusetts procedure which grants a de novo trial for relatively insubstantial offenses is a sufficient safegard to insulate an individual from being deprived of liberty by the "unfettered discretion of a single judge." See Jones v. Barnes, ___U.S. ___, 103 S.Ct. 3308, 3315, n.1 (1983), (Brennan, J. dissenting).

In the instant case, not only has a reviewing court not determined that the evidence introduced at petitioner's bench trial was insufficient, there is no reviewing or appellate court within the Massachusetts system to make such a determination.[19]

As previously stated, under Massachusetts trial procedure, there is no appellate review of a bench trial which is voluntarily chosen by a defendant. Relief from an adverse decision at the bench trial is by a de novo trial before a jury or another judge, if the defendant waives the

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19/ Respondents' contention that a finding of insufficiency as a matter of law was made by the Single Justice must fail in the face of the specific refutation of such a contention in the majority opinion in Lydon v. Commonwealth, 381 Mass. 356, 359, n.6, 361.

jury. The claim of the de novo trial wipes out all that has gone before. Mann v. Commonwealth, 359 Mass. 661 (1971). In order for the petitioner to raise a claim under Burks, it is necessary that an appellate court has ruled in his favor on the sufficiency of the evidence claim. However, there is simply no constitutional requirement that Massachusetts provide such review from a bench trial. Griffin v. Illinois, 351 U.S. 12, 18 (1956). Therefore, Burks, simply, is not applicable.

It is further submitted that the First Circuit's opinion that review of the sufficiency of the evidence claim in the first instance by a federal district court by way of a habeas corpus petition, satisfies the Burks requirement is unsupported and violates

the long-standing rule that the writ "will not be allowed to do service for an appeal." Sunal v. Large, 332 U.S. 174, 178 (1947).

The First Circuit's reliance on Jackson v. Virginia, 443 U.S. 307 (1979) is misplaced. Jackson sought habeas corpus relief pursuant to 28 U.S.C. §2254, after a state Supreme Court had denied on the merits a petition for writ of error which alleged that the evidence was insufficient to support conviction. This Court found that Congress had specifically provided for review of the issue in the federal court under §§2254[20/] This Court held only that,

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20/ Jackson did not involve pre-trial review of the issue under §2241.

> ...in a challenge to a state criminal conviction brought under 28 U.S.C. §2254-if the settled procedural prerequisites for such a claim have otherwise been satisfied-the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found guilt beyond a reasonable doubt". Id., at 324.

The court announced a new constitutional standard of review applicable once jurisdictional prerequisites under §2254 have been met; it did not extend habeas corpus jurisdiction. Nor, does Jackson provide a basis for extending Burks to the trial de novo system.

The rationale put forth by this Court for providing such review also indicates it's inapplicability to the instant situation.

> "The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur-reflecting as it does the

> belief that the 'finality' of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right-is not one that can be so lightly abjured" Id., at 323.

There is no finality, in general, attendant to a determination of guilt at a bench trial and in this specific case the judgment was "wiped out" when Lydon voluntarily chose a de novo trial. Thus, it is clear that Lydon has not satisfied the settled procedural prerequisite for bringing his claim under §2254.

Therefore, it is submitted that the court below, sitting as a habeas court, has improperly assumed for itself the role of a first instance reviewing court over a state criminal proceeding.

> "It hardly bears repeating that habeas corpus is not intended as a substitute for appeal, nor as a device for reviewing the merits of

guilt determination at criminal trials. See generally Stone v. Powell, 428 U.S. 465. Instead, it is designed to guard against extreme malfunctions in the state criminal justice systems. Jackson v. Virginia at 332, n. 5 (Stevens J. concurring).

B. The Double Jeopardy Clause Is Not Offended By Operation Of The Trial De Novo System.

This is not a situation which the double jeopardy clause is designed to protect against. Double jeopardy protections are directed against

> "...permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977).

The government is not pressing a second trial, the petitioner has chosen it, just as he voluntarily opted for a bench trial in the first instance. See, United States v. Scott, 437 U.S. 82, 99 (1978). This procedure was upheld in

face of a double jeopardy claim in Ludwig v. Massachusetts, 427 U.S. 618 (1976) wherein the Court stated:

> "Nothing in the Double Jeopardy Clause prohibits a state from affording a defendant two opportunities to avoid conviction and secure an acquittal.' Id. at 632.

See also Colton v. Kentucky, 407 U.S. 104 (1971).

As the dissenting opinion below so aptly points out, if the de novo system is viewed as a whole there is "little ground for serious concern that the policy underlying the double jeopardy clause is being offended". Lydon at 11. (J.A. 83a).

First, the system is not forced upon the defendant, he may choose an initial jury trial with conventional appeal. The basic double jeopardy protections are afforded a defendant in the de novo

system, if a judgment of acquittal is entered at the first tier further prosecution is precluded. As a practical matter the system provides a defendant with two opportunities for acquittal on the facts. As the dissenting opinion recognizes, in foregoing a right to appeal at the first tier, "convicted defendants gain the right not to be convicted finally unless the prosecution twice proves their guilt beyond a reasonable doubt". Lydon at 12. (J.A. 84a).

Moreover, even though at a de novo trial the prosecution could put in a stronger case (if additional evidence existed), the defendant has gained a tactical advantage of having discovered the prosecution's case and, it is unlikely that the prosecution would present less than its best case in the

first instance for an acquittal would bar further proceedings. Finally, if by chance a defendant is convicted at the de novo jury trial, he has an appellate remedy to vindicate his claim.

The decision below needlessly affects the ability of the state to experiment in the area of criminal trial procedure and to provide practical advantages to defendants, without any indication that the trial de novo system operates in a manner which is arbitrary, capricious or unreasonable. See New York State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1972) (Brandeis, J.).

The decision not only constitutes an injustice to the Commonwealth,[21] but

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21/ Subsequent to the First Circuit decision in Lydon, the Supreme Judicial Court in dicta declared 'in aid of sound

(footnote continued)

coupled with its total relaxation of "custody" requirements places an unnecessary burden upon the federal district courts by requiring them to sit as a court of appellate review in the first instance in every case in which

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(footnote continued)

judicial administration, that from the issuance of a rescript upon this opinion, twenty-eight days hence'...a waiver of a claim of double jeopardy shall be obtained at the same time as the written waiver and consent to be held by the court without a jury is obtained." Commonwealth v. Montanez, 388 Mass. 603, 605, 447 N.E.2d. 660 (1983).

The court adopted this course in response to the decision of the First Circuit and in recognition of the federal court's assumption of power to review all bench trials. Id. The court's directive however, does not affect cases tried in the district courts from the time of the Lydon decision on August 22, 1980 and the effective date of the waiver requirement - April 29, 1983.

insufficiency of evidence is alleged by a defendant convicted at a bench trial in the Commonwealth of Massachusetts. Such a result disrupts the orderly administration of justice in the already overburdened federal system and causes significant delay in the two-tier system where those convicted in the bench trial may now avail themselves of yet a third federally created tier. Such a procedure offends all notions of comity and federalism and creates an entirely new class of cases susceptible to habeas review.[22/] Moreover, the federal

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22/ For example, the following habeas petitions are pending in the District Court and Court of Appeals: Tinder v. Sister Rose Paula, C.A. No. 83-1507; Hutson v. Justices of the District Court of Wareham, C.A.No. 83-1088 (denial of counsel at bench trial); Montanez v. Justices of the Boston Municipal Court, No. 82-1965-N; Murchinson v. Justices of the Boston Municipal Court, No. 83-444-S.

court's virtual abandonment of the 'custody' requirement for federal habeas review. reaches far beyond the de novo system.

CONCLUSION

For the reasons stated above the decision of Court of Appeals for the First Circuit should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

Massachusetts General Laws, Chapter 218, Section 26: General Provisions.

The district courts and the municipal court of the city of Boston shall have original jurisdiction, concurrent with the superior court, of the following offenses, complaint of which shall be brought in the division of the district court department, or in the Boston municipal court department, as the case may be, within which judicial district the offense was allegedly committed or is otherwise made punishable: all violations of bylaws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes listed in paragraph (a) of section twenty-four G of chapter ninety section fifteen A of chapter two hundred and sixty-five and sections sixteen, seventeen, eighteen, nineteen, twenty-eight, forty-nine and one hundred and twenty-seven of chapter two hundred and sixty-six, and the crimes of malicious destruction of personal property under section one hundred and twenty-seven of chapter two hundred and sixty-six, indecent assault and battery on a child under fourteen years of age, escape or attempt to escape from any penal institution, forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged. They

shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven.

Massachusetts General Laws, Chapter 218, Section 26A: Trial by jury of six; waiver.

Trial of criminal offenses in the Boston municipal court department and in the divisions of the district court department shall be by a jury of six, unless the defendant files a written waiver and consent to be tried by the court without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section twenty-seven A. Such waiver shall not be received unless the defendant is represented by counsel or has filed a written waiver of counsel. Such trials by jury in the first instance shall be in those jury sessions designated by said section twenty-seven A for the hearing of such appeals. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance.

Massachusetts General Laws, Chapter 218, Section 27: Imposition of penalties.

They may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to the state prison.

Massachusetts General Laws, Chapter 218, Section 27(a): Appeals; jury-of-six sessions.

(a) Every division of the district court department is authorized to hold jury-of-six sessions for the purpose of hearing appeals by defendants found guilty in the several divisions of criminal offenses over which the district courts have original jurisdiction under the provisions of section twenty-six. The Boston municipal court department shall also be so authorized for the purpose of hearing appeals from convictions in said Boston municipal court department, or in the divisions of the district court department in Suffolk county.

Massachusetts General Laws, Chapter 218, Section 27(g): Appeals; jury-of-six sessions.

(g) The district attorney for the district in which the alleged offense or offenses occurred shall appear for the commonwealth in all cases. The administrative justices for the district court department and the Boston municipal court department shall arrange for the sittings of the jury sessions of their respective departments and shall assign justices thereto, to the end that speedy trials may be provided for such appeals. Review may be had directly by the appeals court, by appeal, report or otherwise in the same manner provided for trials of criminal cases in the

superior court. The defendant may elect to waive a jury of six in the manner provided by section six of chapter two hundred and sixty-three.

Massachusetts General Laws, Chapter 276, Section 65: Condition of recognizance.

The condition of a recognizance of a person, either with or without surety, binding him to appear before a court or justice to answer to a charge against him or to prosecute an appeal shall be so framed as to bind him personally to appear at the time so expressed, and at any subsequent time to which the case may be continued, unless previously surrendered or discharged, and so from time to time, until the final decree, sentence or order of the court or justice thereon, and to abide such final sentence, order or decree, and not depart without leave. The condition of a recognizance of a person held to answer to a charge before a district court shall be further so framed as to bind him to appear before the district court to answer to the charge and before the superior court to prosecute an appeal on said charge or to answer to any indictment which may be returned against him. The superior court shall by rule provide for the forms of recognizances and bail bonds. A recognizance of a person held to answer to a complaint before a district court which is required by law to sit in more than one municipality may, with his consent or at his request, be

conditioned for his appearance at the next sitting of the court at any one of said municipalities.

Massachusetts General Laws, Chapter 278, Section 18: Appeals in criminal cases to jury-of-six sessions; recognizance.

Whoever is found guilty of a crime before a justice in a district court, or in the municipal court of the city of Boston, having filed the written waiver of trial by jury in the first instance provided by section twenty-six A of chapter two hundred and eighteen, may appeal the finding of guilty or the sentence imposed thereon to a jury-of-six session in accordance with section twenty-seven A of chapter two hundred and eighteen, and at the time of such finding of guilty or sentencing shall be notified of his right to take such appeal. The case shall be entered in the jury-of-six session on the return day next after the appeal is taken, and the appellant shall be released on personal recognizance or committed, in accordance with the procedures set forth in section fifty-eight of chapter two hundred and seventy-six, until he recognizes to the commonwealth, in such sum and with such surety or sureties as the court requires, with condition to appear at said jury session on said return day and at any subsequent time to which the case may be continued, if not previously surrendered and discharged, and so from time to time until the final sentence, order or decree, and not

depart without leave, and in the meantime to keep the peace and be of good behavior. If the appellant is not released on personal recognizance and is committed for failure to recognize, the superior court shall thereupon have jurisdiction of the case only for the purpose of revising the amount of bail required as aforesaid. The appellant shall not be required to advance any fees upon claiming his appeal or in prosecuting the same. Notwithstanding any other provision of law, a defendant after a finding of guilty, jury-waived, in a district court, or the municipal court of the city of Boston, may appeal therefrom and shall thereafter be entitled to a trial de novo in a jury-of-six session in accordance with said section twenty-seven A.

Massachusetts General Laws, Chapter 278, Section 24: Failure to enter and prosecute appeal; sentence.

If the appellant fails to enter and prosecute his appeal, he shall be defaulted on his recognizance and the jury-of-six session may impose sentence upon him for the crime of which he was convicted, as if he had been convicted in said court, and, if he is not then in custody, may issue process to bring him into court to receive sentence.

Massachusetts General Laws, Chapter 279, Section 3: Arrest without warrant of person on probation; warrant for arrest

of persons already imprisoned; application for disposition.

At any time before final disposition of the case of a person placed under probation supervision or in the custody or care of a probation officer, the probation officer may arrest him without a warrant and take him before the court, or the court may issue a warrant for his arrest. When taken before the court, it may, if he has not been sentenced, sentence him or make any other lawful disposition of the case, and if he has been sentenced, it may continue or revoke the suspension of the execution of his sentence. If such suspension is revoked, the sentence shall be in full force and effect. If a warrant has been issued by the court for the arrest of such a person and he is a prisoner in any correctional institution, jail or house of correction, the commissioner of correction, the sheriff, master or keeper of said house of correction, or in Suffolk county, the penal institutions commissioner of the city of Boston, as the case may be, having such prisoner under his supervision or control, upon receiving notice of such warrant, shall notify such prisoner that he has the right to apply to the court for prompt disposition thereof. Such an application shall be in writing and given or sent by such prisoner to the commissioner of correction, or such sheriff, master, keeper, or penal institutions commissioner, who shall promptly forward it to the court from which the warrant issued, by certified

mail, together with a certificate of said commissioner of correction, sheriff, master, keeper, or penal institutions commissioner, stating (a) the term of commitment under which such prisoner is being held, (b) the amount of time served, (c) the amount of time remaining to be served, (d) the amount of good time earned, (e) the time of parole eligibility of such prisoner, and (f) any decisions of the board of parole relating to such prisoner. Said commissioner of correction, sheriff, master, keeper, or penal institutions commissioner shall notify the appropriate district attorney by certified mail of such application to the court. Any such prisoner shall, within six months after such application is received by the court, be brought into court for sentencing or other lawful disposition of his case as hereinbefore provided.

In no case where a provision of this chapter provides for a finding, disposition or other order to be made by the court, or for a warrant to be issued, shall such be made or issued by any person other than a justice, special justice or other person exercising the powers of a magistrate.

Title 28, United States Code, Section 2241: Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme court, any justice thereof, the district courts and any circuit judge within their

respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and

effect of which depend upon the law of nations; or
(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

Title 28, United States Code, Section 2254: State custody; remedies in state courts.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

Rule 10. Powers of Magistrates

The duties imposed upon the judge of the district court by these rules may be performed by a United States magistrate pursuant to 28 U.S.C. §636.

Office-Supreme Court, U.S.
FILED
OCT 6 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 82-1479

THE JUSTICES OF THE BOSTON
MUNICIPAL COURT,
Petitioners,

v.

MICHAEL LYDON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

I. Does the Double Jeopardy Clause permit the Commonwealth of Massachusetts to subject Michael Lydon to a trial *de novo* where the evidence at his first trial was insufficient as a matter of law?

II. Is habeas corpus available to prevent a trial *de novo* which would violate a petitioner's double jeopardy right not to undergo a second trial for the same offense?

III. Is a defendant released on personal recognizance after a *de novo* appeal from a conviction and two year sentence in custody for the purpose of habeas corpus?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

No. 82-1479

THE JUSTICES OF THE BOSTON
MUNICIPAL COURT,
Petitioners,

v.

MICHAEL LYDON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF OF THE RESPONDENT

STATEMENT OF THE CASE

Michael Lydon was charged in the Boston Municipal Court with illegal possession of burglarious implements. He exercised his option to participate in the Massachusetts system of trial de novo. M.G.L. Ch. 218, §26A. He was

never informed that a consequence of this choice would be to permit the prosecution to bolster its case if he appealed for a trial de novo after a conviction based on inadequate evidence. Lydon v. Justices, 536 F.Supp. 647, 651 (D. Mass. 1982)(J.A. 59a). At the time, no state appellate court had decided the issue and several state trial judges had already ruled that double jeopardy prevented such an occurance. See Casenote, 15 New England L. Rev. 303, 319 (1981).

Mr. Lydon was convicted at a trial in the first tier of the process, over his objection that the prosecution had failed to present sufficient evidence of one of the elements of the crime: the illegal intent charged in the complaint. After receiving a two-year jail sentence, he exercised the only option Massachusetts law gave him, and requested a trial de novo in the jury session of the Boston Municipal Court. The court released him

on personal recognizance. Among the conditions of his recognizance were that he appear when required, as well as "not depart without leave and in the meantime keep the peace and be of good behavior." M.G.L. Ch. 276 §18.

Prior to his second trial, he moved to dismiss the case against him on the ground that as a matter of law, the evidence in his first trial was insufficient to support his conviction, and therefore the Double Jeopardy Clause barred retrial. The motion was denied without a hearing. Lydon v. Justices, 536 F.Supp. at 649.

Mr. Lydon then sought relief from a Single Justice of the Supreme Judicial Court, who granted a stay of the trial. In the proceedings before the Single Justice, the prosecution conceded that the evidence at Mr. Lydon's trial was not sufficient to support his conviction. (J.A. 17a)

After a hearing, the Single Justice ruled that on the basis of the original transcript, the evidence at Mr. Lydon's trial was insufficient as a matter of law. (J.A. 19a). The Single Justice, however, reserved ruling on the merits of the double jeopardy claim and reported it to the full bench. (J.A. 20a) The Supreme Judicial Court, in a 5-2 decision, ultimately rejected Mr. Lydon's claim and ordered the case to go to trial. Lydon v. Commonwealth, 381 Mass. 356, cert. denied 449 U.S. 1065 (1980). Mr. Lydon remained subject to the conditions of his recognizance.

Mr. Lydon, while incarcerated on an unrelated sentence which has since expired, filed a petition for a writ of habeas corpus in the District Court. The petition sought Mr. Lydon's release from the custody in which the state court judges held him by virtue of his pending trial.

After briefing and argument, the District Court rendered an opinion, Lydon v. Justices of Boston Municipal Court, 536 F.Supp. 647 (D. Mass. 1982)(J.A. 52a), in which it found that the petition met the custody and exhaustion requirements for habeas corpus jurisdiction. Based on its independent review of the transcript of Mr. Lydon's original trial, the court found that the case against him could not rationally support a conviction. Id. at 652 (J.A. 60a). From this finding flowed the conclusion that the Double Jeopardy Clause of the Fifth Amendment prohibited the Commonwealth from trying Mr. Lydon a second time.

The court granted the writ, ordered Mr. Lydon's release and prohibited his retrial. The Commonwealth appealed and obtained a stay, which it sought on the representation that the state would not

move to retry Mr. Lydon pending the disposition of the appeal.

The Court of Appeals affirmed, in a 2-1 decision. Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1 (1st Cir. 1982)(J.A. 62a). The court found that habeas corpus was an appropriate remedy to protect an individual's right to be free from successive trials, and that Mr. Lydon's trial de novo was barred by the Double Jeopardy Clause. In a dissenting opinion, Judge Campbell began by stating "The court may be right." Lydon v. Justices, 698 F.2d at 10 (J.A. 82a), but went on to argue that the Double Jeopardy Clause should not bar Mr. Lydon's trial de novo.

SUMMARY OF THE ARGUMENT

I. The Double Jeopardy Clause of the Fifth Amendment establishes as a fundamental rule that a state may have only one full and fair opportunity to convict someone of a crime. This rule protects the innocent because our system recognizes that successive trials pose not only a personal ordeal for the defendant, but the risk of inaccurate convictions.

All of the reasons to prohibit such trials are present in Mr. Lydon's case. The prosecutor had a full and fair opportunity to present evidence to show that Mr. Lydon committed the crime with which he was charged. After the conviction, the prosecutor conceded that the evidence at the trial was insufficient as a matter of law. The Single Justice who examined the transcript of the trial, and both federal courts, found that the evidence could not

rationally support a guilty verdict. Mr. Lydon therefore deserves whatever protection the Double Jeopardy Clause affords those innocent of the charges they face.

Had the trial judge evaluated the evidence in a rational manner and acquitted Mr. Lydon, double jeopardy would have forever barred a retrial. The fact that the trial judge acted irrationally gives the prosecutor no justification for doing what the Constitution otherwise prohibits.

This Court recognized in Burks v. United States, 437 U.S. 1 (1978), that the Double Jeopardy Clause bars the retrial of a defendant whose conviction rests on insufficient evidence. Burks arose in the context of a conviction reversed on appeal. However, its principle would be an anomoly if it were confined solely to cases where an appellate court reversed a defendant's conviction,

and not to other contexts raising the same question of double jeopardy's consequence for a retrial after an improper conviction based on insufficient evidence. Courts, following the lead of Hudson v. Louisiana, 450 U.S. 40 (1981), have been nearly uniform in applying Burks to other contexts, including habeas corpus cases.

The Commonwealth, despite the fact that a Single Justice of the Supreme Judicial Court ruled that the evidence was insufficient, argues that Burks is inapplicable to Mr. Lydon's trial de novo because no Massachusetts reviewing court ever considered the question of whether the evidence supported the verdict. Aside from ignoring the record, this argument would render the Double Jeopardy Clause meaningless. It would allow states to strip defendants of its protection simply by refusing to engage in the type of review that would

reveal a Double Jeopardy violation in the first place. Massachusetts may not allow its prosecutors a chance to strengthen an insufficient case.

Mr. Lydon's request for a new trial did not waive the protection the Double Jeopardy Clause otherwise affords him. The only option to accepting the original conviction and sentence, that Massachusetts law gives defendants in the de novo system, is requesting a new trial. This is not the type of meaningful choice the Double Jeopardy Clause requires for a valid waiver. Moreover, the Court made clear in Burks that a defendant's request for a new trial does not allow the prosecutor a normally forbidden "second bite at the apple."

Nor did Mr. Lydon's original decision to participate in the de novo system strip him of Burks' protection. The Commonwealth presented no evidence that Mr. Lydon

knowingly relinquished his double jeopardy rights when he made this choice. In fact, the most reasonable conclusion from the record is that Mr. Lydon relied on the application of Burks to the de novo system when he made his election. Massachusetts trial court decisions at the time supported the belief that Burks applied to de novo defendants.

In light of Mr. Lydon's reasonable reliance on Burks, it is unfair to strip him of its protection. This is especially so because the Commonwealth, not Mr. Lydon, bears the responsibility for creating the problem of a second trial. Had the original trial judge evaluated the evidence properly, or had the prosecutor either dismissed the inadequate case or presented sufficient evidence (if it were possible to do so), no double jeopardy question would have arisen. Nothing that Mr. Lydon did contri-

buted to the judge's irrational verdict, nor did the prosecutor find it harder to present a sufficient case because Mr. Lydon had chosen to participate in the de novo system.

Massachusetts may not impose the loss of the protection of the Double Jeopardy Clause as a price on a defendant's entry into the de novo system. Although the Commonwealth need not have a de novo system at all, that fact does not allow it to offer one that is constitutionally defective. After all, states need not allow judges the power to grant new trial motions. But Burks made clear that a state cannot strip a defendant who takes advantage of such a procedure of his protection against a second trial if the evidence was insufficient initially. Burks 437 U.S. at 17-18.

Nor may Massachusetts justify the

forbidden opportunity it wants to afford the prosecutor on the ground that the de novo system offers advantages to defendants in general. Mr. Lydon's rights may not be forfeited for the benefit of others, especially sincesuch a sacrifice is not necessary. The de novo system can easily accomodate Burks either by instituting a waiver process, as Massachusetts has already done, or by allowing a review of the sufficiency of the evidence at the first tier trial, as do other states.

II. The Double Jeopardy Clause provides protection not only against multiple convictions for the same offense, but from the ordeal of having to undergo multiple trials. It is unique among constitutional rights in requiring a remedy before the trial has begun in order to vindicate fully the values it protects.

Since the Double Jeopardy Clause prohibited Massachusetts from subjecting Mr. Lydon to a trial de novo, habeas corpus relief was proper prior to his retrial.

This Court has entertained the merits of a double jeopardy claim that arose in a pre-trial habeas corpus case, Arizona v. Washington, 434 U.S. 497 (1978), and federal courts have uniformly followed this lead. So long as a habeas corpus petitioner has exhausted his state remedies, no interest of federalism requires a state defendant to suffer an irreparable injury to a constitutional interest before obtaining federal relief.

Mr. Lydon has meticulously and exhaustively presented precisely the same issue contained in his habeas corpus petition at every state opportunity available to him. The state's highest court considered the exact constitutional claim on which

Mr. Lydon obtained federal relief. The doctrine of comity requires only that federal courts allow the states a fair opportunity to rule on an issue. The courts of Massachusetts have received just that.

Since the Double Jeopardy Clause bars Mr. Lydon's retrial, then the restraints imposed upon him by the judges of the Boston Municipal Court to ensure his appearance at that trial are restraints in violation of the Constitution. The doctrine of Younger v. Harris, 401 U.S. 37 (1971), does not bar the Court from releasing Mr. Lydon from these restraints. Younger did not stop this Court from considering the merits of a pre-trial habeas corpus petition alleging a double jeopardy violation in Arizona v. Washington. Furthermore, Younger itself recognized certain limits on its application,

401 U.S. at 53. For example, federal courts may intervene when a petitioner has no other remedy and faces an irrevocable loss of his constitutional rights, as Mr. Lydon does. Mr. Lydon cannot protect his constitutional rights by raising his challenge at trial. If he does not obtain federal relief now, he will suffer the very evil the Double Jeopardy Clause was designed to prevent. The First Circuit was correct in following the example of the other Courts of Appeals in holding that Younger is no bar to federal intervention when it is necessary to uphold the Constitution's ban on successive trials.

All the equities favored granting relief to Mr. Lydon. He had undergone one full trial, where even the prosecutor conceded the evidence was insufficient. He had fully exhausted his state remedies. Moreover, the state courts themselves had

indicated, by granting an 11-month stay, that careful consideration of the constitutional claim was more important than a speedy trial.

The cases which deny interlocutory review of double jeopardy claims based on insufficient evidence at a defendant's original trial do not bar Mr. Lydon's claim for three reasons. First, these cases rest on the assumption that the defendant will eventually have review of the evidence at the first trial if he is convicted after the second. However, Massachusetts has stated it will never examine the evidence in Mr. Lydon's first trial. In such a circumstance, the reasons for postponing review do not apply. Second, these cases depend on the rule that the Constitution does not require the states to provide appellate review of criminal convictions. However, this

rule is not relevant to the scope of habeas corpus jurisdiction. Massachusetts may not have to afford its defendants pre-trial review of double jeopardy claims. But Congress has not expressed an intent to limit habeas corpus to those cases where the states must provide appellate review. Habeas corpus is a broader remedy than the bare minimum the Constitution demands of the states themselves. Third, these cases all apply a construction of the phrase "final decisions" which appears in the federal statute pertaining to appellate review (28 U.S.C. §1291), which restricts interlocutory appeals to non-collateral issues. However, the words "final decisions" do not appear in the habeas corpus statutes. Whether an issue is collateral is simply irrelevant to habeas corpus jurisdiction. Habeas corpus has its own doctrines to serve the interest

of efficient adjudication, namely comity and exhaustion, and should not adopt extraneous tests designed to meet the needs of other procedural schemes.

III. Mr. Lydon is currently in the custody of the judges who released him on personal recognizance, by virtue of the conditions they placed on him which restrict his liberty. In holding that Mr. Lydon met the custody requirement of the habeas corpus statutes, the First Circuit followed the clear mandate of this Court in Hensley v. Municipal Court, 411 U.S. 345 (1973), and the unbroken line of federal authority since then.

Hensley held that a defendant released on personal recognizance pending the execution of a sentence, was in custody because he was subject to restraints not shared by the public generally. The Court

specifically noted that its ruling applied to defendants released on personal recognizance prior to a trial. Hensley, 411 U.S. at 353. The Commonwealth is unable to cite a single case to support its contention that Mr. Lydon was not in custody.

Mr. Lydon's conditions of release, in fact, restricted his liberty beyond the terms the Court considered in Hensley. Like Hensley, Mr. Lydon's recognizance required him to appear when ordered, upon pain of a criminal penalty. Mr. Lydon also faced the reimposition of his two year sentence if he failed to appear. Moreover, Mr. Lydon's recognizance required him to appear on any other charge as well. He was also subject to arrest and detention if he failed to "keep the peace and be of good behavior" in the interim. Thus, his position was analogous to a person

on parole, a condition that clearly meets the custody requirement. Jones v. Cunningham, 371 U.S. 236 (1963).

Hensley noted that even if a defendant is in custody prior to his trial, he must still meet the exhaustion requirement to qualify for federal habeas corpus. As a practical matter, then, only defendants raising a double jeopardy claim which they have fully presented to the state courts will be affected by this ruling. Reversing Hensley would simply lead defendants to surrender themselves temporarily to state authorities to establish custody, file a habeas corpus petition, and then regain their release. This behavior would serve no useful purpose.

ARGUMENT

I. RETRIAL OF MICHAEL LYDON AFTER THE PROSECUTION FAILED TO PRODUCE SUFFICIENT EVIDENCE AT HIS FIRST TRIAL WOULD VIOLATE THE DOUBLE JEOPARDY CLAUSE.

The Commonwealth of Massachusetts has brought this Court a request to allow it to place one of its citizens, Michael Lydon, in jeopardy a second time for the same offense. The first time Mr. Lydon was in jeopardy, the Commonwealth had a full and fair opportunity to present evidence that he committed a crime. As the prosecutor conceded in the state courts, the only conclusion a rational person could draw from the evidence at that trial was that Mr. Lydon deserved to go free. This Court must decide if the Double Jeopardy Clause of the United States Constitution allows the Commonwealth to subject Mr. Lydon to a second trial.

A. The Double Jeopardy Clause Protetts the Innocent.

The Double Jeopardy Clause plays a key role in the constitutional scheme of limited government. United States v. Jorn, 400 U.S. 470, 479 (1971). The restrictions it places on the state have an ancient lineage. Its limitation on the government's power is "one of the oldest ideas found in western civilization." Bartkus v. Illinois, 359 U.S. 121, 151 (1959) (Black, J., dissenting). The values the Clause implements recognize that "permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm the Government with a potent instrument of oppression." United States v. Martin Linen Supply Co., 430 U.S. 564 569 (1977). In order to confine this power within safe limits, the Double Jeopardy Clause manifests a "will-

ingness to limit the government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." Jorn, 400 U.S. at 479.

Thus, there is a general rule that restricts the prosecutor to one opportunity. See Arizona v. Washington, 434 U.S. 497, 505 (1978). It recognizes several truths. Forcing a citizen to defend any criminal trial entails a significant financial and emotional strain. Arizona v. Washington, 434 U.S. at 504 n.12-13; Jorn 400 U.S. at 483; Green v. United States 355 U.S. 184, 187 (1957). It also exposes him to the stigma that attends one facing a criminal charge. But perhaps the central purpose of the prohibition against successive trials is to protect innocent defendants. Swisher v. Brady,

438 U.S. 204, 215-16 (1978).

Successive trials present an unacceptable risk to the innocent for several reasons. First, not every finder of fact will view the same case in the same light. Given enough chances , a prosecutor with a weak case may eventually find someone inordinately willing to be convinced of the defendant's guilt. United States v. Wilson, 420 U.S. 332, 352 (1975). Second, having a preview of how a defendant will react to the state's case allows a prosecutor to alter his tactics to make a more persuasive presentation the next time around. Id., United States v. DiFrancesco, 449 U.S. 117, 128 (1980); Tibbs v. Florida, 457 U.S. 31, 43 n.19 (1982). And third, there is an inexorable pressure on witnesses to alter their testimony in successive trials to favor in subtle ways, the side that presents them. Arizona v.

Washington, 434 U.S. at 504 n.14. Any system that allows the prosecutor to try a defendant a second time after failing initially to present a sufficient case for a rational person to find guilt, will increase the risk of convicting some people who did not in fact commit the crimes with which they are charged.

B. Mr. Lydon's Retrial Raises All Of Double Jeopardy's Concerns For The Innocent.

Mr. Lydon's situation presents an especially compelling case to apply the general rule limiting the government to a single trial. The Commonwealth of Massachusetts held a complete trial on the question of guilt. The prosecutor fully questioned all the witnesses that he called. No prosecution evidence was improperly excluded. See Transcript, Appendix C to Habeas Corpus Petition. And yet, the only rational conclusion from the testimony

of all the witnesses is that Mr. Lydon was not guilty. See Lydon v. Justices of the Boston Municipal Court, 536 F.Supp. 647, 652 (D. Mass. 1982). (J.A. 60a).

This is not a case where the government seeks to retry one whose guilt is clear. United States v. Tateo, 377 U.S. 463, 466 (1964). Nothing in the record comes close to establishing that Mr. Lydon committed the crime. Nor is it a case where a retrial is necessary to vindicate "the public's interest in fair trials designed to end in just judgments." Oregon v. Kennedy, 456 U.S. 667, 672 (1982) quoting Wade v. Hunter, 336 U.S. 684, 689 (1949). That interest is satisfied by "affording the prosecutor one full and fair opportunity to present his evidence to the jury." Oregon v. Kennedy, 456 U.S. at 682 (Stevens, J. concurring). But here, the prosecution

had its chance and failed to prove Mr. Lydon's guilt.

Since the Double Jeopardy Clause protects the innocent, it protects Mr. Lydon. There is proof, susceptible of only one rational interpretation, which supports his innocence. Prior to trial, we simply assume someone is innocent. Even after an acquittal, we cannot say that all rational people must agree with a judgment that the defendant deserves to go free. Cf. Fong Foo v. United States, 369 U.S. 141 (1962). But when a defendant establishes that there was not enough evidence to warrant any rational person in convicting him, we have an affirmative demonstration that society has no further interest in making him the object of a criminal sanction.

Thus, the reasons that the Double Jeopardy Clause prohibits successive trials are all manifest in the Commonwealth of Massachusetts' attempt to try Michael Lydon a second time. The transcript of Mr. Lydon's original trial clearly shows he did not commit the crime for which the Commonwealth would like to put him in jail. One must judge his guilt in light of the complaint the prosecutor brought against him. Jackson v. Virginia, 443 U.S. 307, 314 (1979); Sanabria v. United States, 437 U.S 54, 65 (1978). By that standard, he simply may not be punished. Moreover, he has already had to undergo the ordeal of one trial. The consequence of this trial illustrates its traumatic nature. Mr. Lydon stood to lose two years of his freedom as a result. Few people could face repeating this test without considerable anxiety. A second trial can

only be a more ominous prospect in light of the fact that the Massachusetts criminal justice system operated irrationally in its first encounter with Mr. Lydon. He can hardly be faulted for wondering whether a second trial will faithfully apply the law. In addition, the stress of a second trial is enhanced by a concern for exactly how the prosecutor will attempt to supply the evidence that was lacking in his original case. Not every second effort will more accurately reflect the truth than the first.

C. Double Jeopardy Prevents The Prosecutor From Taking a "Second Bite at the Apple."

This Court has held that "a central purpose 'of the prohibition against successive trials 'is to bar 'the prosecution [from] another opportunity to supply evidence which it failed to muster in the first proceeding'." Swisher, 438 U.S. at

216. It is exactly this forbidden "second bite at the apple" that the Commonwealth of Massachusetts is seeking. Despite its acknowledged failure to prove Mr. Lydon's guilt, the Commonwealth is trying to uphold a system that would permit it either to imprison Mr. Lydon for two years on the basis of an irrational conviction, or to try him a second time. Surely, there is no moral justification for the former. And clearly there can be no legitimate reason to allow the prosecutor again to present an insufficient case. A retrial would serve only to permit the Commonwealth of Massachusetts to hone its trial strategy and perfect its evidence - precisely the evil which this Court has stated the Double Jeopardy Clause prohibits. Tibbs v. Florida, 457 U.S. 31, 41 (1982).

Burks v. United States, 437 U.S. 1 (1978) made clear the impermissible nature of a prosecutor's interest in retrying a defendant after an intial failure of proof. Burks was convicted in a Federal District Court of bank robbery, despite having presented an insanity defense. The United States Court of Appeals for the Sixth Circuit found that the evidence of the accused's sanity was insufficient to support the verdict. The Court of Appeals then remanded the case to the District Court to determine, from a balancing of the equities, whether a judgment of acquittal should be entered or a new trial ordered. Burks v. United States, 547 F.2d 968, 970 (6th Cir. 1976). After granting Burks' petition for certiorari, a unanimous Court ruled that the Double Jeopardy Clause bars a retrial when the reversal results from evidentiary insuf-

ficiency as distinguished from trial error. Writing for the Court, Chief Justice Burger stated:

> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. . . . The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble . . . Since we necessarily afford absolute finality to a [factfinder's] verdict of acquittal -- no matter how erroneous [the] decision--it is difficult to concieve how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the [factfinder] could not properly have returned a verdict of guilty.
>
> [T]he purpose of the[Double Jeopardy] Clause would be negated were we to afford the Government an opportunity for the proverbial "second bite at the apple." Burks, 437 U.S. at 15-17.

In a companion case, the Court held that Burks applies to prosection in state courts. Greene v. Massey, 437 U.S. 19

(1978). Since these two cases, the Court has repeatedly identified this "second crack" for the prosecutor as a key element in determining whether a state's criminal trial scheme violates the Constitution. Id.; Swisher, 438 U.S. at 216; DiFrancesco, 449 U.S. at 140.

D. Double Jeopardy's Protection Depends on the Nature of the Right and Not the Nature of the Court Examining the Claim.

The Commonwealth's attempt to distinguish Burks seizes upon one phrase in that opinion and takes it out of context. The argument elevates form over substance. The Commonwealth insists that the double jeopardy principle which prohibits a "second bite" for the prosecutor applies only if a self-designed "reviewing court" has already declared the evidence insufficient in the prosecutor's first effort. Petitioners' Brief at 59. Since

the Massachusetts trial de novo system declined to look at the sufficiency of the evidence supporting Mr. Lydon's original conviction, the Commonwealth argues that a retrial will do no harm to the values the Double Jeopardy Clause protects.

Hans Christian Andersen illustrated the flaw in this reasoning in one of his fairy tales. "The Emperor's New Clothes," Hans Andersen's Fairy Tales, 74-81 (1958, R. Spinik, Trans.). As all children instinctively realize, the Emperor was naked long before the little boy who watched him pass on parade cried out the fact in public. It was folly for him to act as if he were fully clothed merely because no one had dared say otherwise. The Double Jeopardy Clause is not made of fabric as gossamer as the Emperor's new clothes. It does not disappear

because the state's court system is structured to ignore what the prosecutor has already conceded and two federal courts later affirmed - that Michael Lydon's original conviction lacked a rational basis.

The prohibition against placing a defendant twice in jeopardy is not so fragile that it depends on matters of form rather than substance. Martin Linen Supply Co., 430 U.S. at 571, 582 (Burger, J., dissenting); Burks, 437 U.S. at 11; United States v. Scott, 437 U.S. 82, 96-97 (1978); DiFrancesco, 449 U.S. at 142; Hudson v. Louisiana, 450 U.S. 40, 44 (1981). The principle the Court announced in Burks does not require some pre-existing announcement by a narrowly defined class of "reviewing court," that a conviction rested on insufficient evidence. The Court has already made that point

clear, and every other state and federal court aside from the Massachusetts Supreme Judicial Court in Lydon v. Commonwealth, 381 Mass. 356, 409 N.E. 2d 745, cert. den., 449 U.S. 1065 (1980), has implemented Burks in that manner.

Burks arose in the context of a traditional appellate court declaring that the evidence at the defendant's trial was insufficient as a matter of law. Yet the Court applied Burks in situations other than appellate reversal. In Hudson v. Louisiana, 450 U.S. 40 (1980), after the defendant was convicted, the trial judge granted a motion for a new trial on the ground that the evidence was insufficient as a matter of law to sustain a conviction. This ruling called the Burks principle into play, even though it originated at the trial, not the appellate, level. Id. at 45 n.6.

Tibbs v. Florida, 457 U.S. at 31, also demonstrates the broad application of Burks. At issue in Tibbs was whether double jeopardy barred retrial after an appellate court had reversed a conviction which rested on a sufficient rational basis, but still did not serve the interests of justice because of the weight of the evidence. In finding no double jeopardy violation, the Court emphasized that its ruling did not open the door for state appellate judges to evade Burks simply by basing their reversals on the weight of the evidence and not addressing its sufficiency. Justice O'Connor's opinion stressed that state courts had an obligation under the Due Process Clause to consider the question of evidentiary sufficiency. Tibbs, 457 U.S. at 44-45. They could not simply afford a defendant a new trial without first ensuring that

the original conviction was at least based on a rational view of the evidence. Id. Accord Lewis v. State, 248 Ga. 566, 285 S.E. 2d 179 (1981); French v. Estelle, 692 F.2d 1021 (5th Cir. 1982). The opinion also indicated that a state court's label of the reasons for its action would not bind a federal court considering the Double Jeopardy question. Tibbs, 457 U.S. at 46-47. If the state court's action conflicted with the Due Process guarantee of sufficient evidence, a federal court could bar a second trial. Id. See Carter v. Estelle, 691 F.2d 777, 782 (5th Cir. 1982). If the Burks double jeopardy question depended entirely upon a pre-existing announcement of evidentiary insufficiency by a "reviewing court" somewhere in the state system, the references in Tibbs to the Due Process guarantee of sufficient evidence would have been superfluous.

No state or federal court since Burks has allowed a conviction to stand when the defendant could establish that at a previous trial, the prosecution's evidence was insufficient. If Burks depended on a pre-existing announcement, then a second trial that took place before any judicial ruling that the evidence at the original trial was insufficient would not violate double jeopardy. Yet courts have overturned convictions in such trials on the basis of Burks in a variety of circumstances.

In some cases, for example, a defendant's first trial ends with a hung jury, despite his claim that the evidence was so deficient that he should have been acquitted as a matter of law. If the Burks principle applies only after a reviewing court has declared the evidence insufficient, such a defendant would have no double jeopardy claim if he were convicted

on sufficient evidence in a second trial. Yet every state and federal court that has considered this question has ruled otherwise. United States v. Richardson, 702 F.2d 1079 (D.C. Cir. 1983); United States v. Portsmith Paving Corp., 694 F.2d 312 (4th Cir. 1982) United States v. Becton, 632 F.2d 1294 (5th Cir. 1980); United States v. Carnes, 618 F.2d 68 (9th Cir. 1980); United States v. Balano, 618 F.2d 624 (10th Cir. 1980); Connecticut v. Servalli, 189 Conn. 201, 455 A.2d 852 (1983). Another context in which the problem arises is when a defendant's original conviction is reversed on appeal for trial error, without any explicit consideration of the question of the sufficiency of the evidence. Again, every court to consider the question has accepted the contention that if the evidence were insufficient at the first trial, it would raise a double jeopardy

bar despite the fact that there was no pre-existing announcement to that effect. See United States v. Marolda, 648 F.2d 623 (9th Cir. 1981); United States v. U.S. Gypsum Co., 600 F.2d 414 (3rd Cir. 1979) cert. den., 444 U.S. 884 (1979); United States v. Sneed, 705 F.2d 745 (5th Cir. 1983). Cf. United States v. Jelsma, 630 F.2d 778 (10th Cir. 1980); United States v. Bizzard, 674 F.2d 1382 (11th Cir. 1982), cert. den., 103 S.Ct. 305 (1982).

This interpretation of Burks has not only been applied by appellate courts to cases which arose within the same court system. It has also been the principle which federal courts have used in habeas corpus cases dealing with state convictions. See Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981); Carpenter v. Leibson, 683 F.2d 169 (6th Cir. 1982). Cf. Carter v. Estelle, 691 F. 2d 777,783 (5th

Cir. 1982).

> Although neither Burks nor Green specifically states that a subsubsequent state retrial would violate the double jeopardy clause if a federal habeas corpus court, instead of an appellate court, finds that a state conviction was based on insufficient evidence, there is no reasonable basis for concluding otherwise. It is, after all, the nature of the right, and not the nature of the reviewing court, that bars a retrial if the reviewing court finds that the original conviction was based on constitutionally deficient evidence.

Delk v. Atkinson, 498 F. Supp. 1282, 1285 (M.D. Tenn. 1980), rev'd on other grounds 665 F.2d 90 (6th Cir. 1981). In Delk, the state appellate court expressly found the evidence at the defendant's first trial to be sufficient, yet the federal court reviewed the question under the twin mandates of Jackson v. Virginia and Burks. The District Court here discharged its obligation, which the state courts refused to perform, to make a review

of the evidence. The District Court's determination that the prosecution failed to prove its case thus brings into play the double jeopardy bar of Burks.

E. The State Courts Found the Evidence at Mr. Lydon's Trial Insufficient as a Matter of Law.

Even if the Commonwealth is correct that Burks requires a ruling of evidentiary insufficiency from a reviewing court in the same judicial system as the trial court, the facts of this case bring it within the confines of the Commonwealth's test. Although the trial judge in the second tier of the de novo system declined to examine the transcript of Mr. Lydon's first trial, a Single Justice of the Supreme Judicial Court, exercising his power of superintendenceunder M.G.L. Ch. 211 §3, did review the sufficiency of the evidence. The Single Justice did not

merely assume that the evidence against Mr. Lydon was insufficient. His opinion clearly establishes that he recognized the importance of confronting the double jeopardy question only in a case where the evidence actually was insufficient. (J.A. 16a). He described his conclusion that the evidence was insufficient as a "ruling." (J.A. 19a). The Commonwealth's argument that the Single Justice did not make a finding of law that the evidence was insufficient, Petitioners' Brief at 59 n. 19, requires one to ignore the plain meaning of the term "ruling." Moreover, it requires one to ignore the way that the full bench of the Supreme Judicial Court described what the Single Justice had done. The opinion of the full bench spoke of the Single Justice's "conclusion" about the insufficiency of the evidence. Lydon v. Commonwealth 381 Mass.

at 359 n.6 (J.A. 39a). It is significant for the Commonwealth's argument that the full bench did not use the term "assumption" to describe the Single Justice's action on the question of whether the prosecutor proved his case against Mr. Lydon. The only support the Commonwealth's argument finds in the full bench's opinion is the statement that the "single justice did not sit as a reviewing court." Id. This ipse dixit illustrates the illogic of the Commonwealth's whole way of defining double jeopardy's protection. Evidently, the Commonwealth of Massachusetts would like to interpret Burks to prevent reprosecution not simply after a judge has ruled that the evidence at a defendant's original trial is insufficient, but only if the state court system is willing in addition to bestow the title "reviewing court" on the forum in which the judge

presided. Such a "narrow, grudging application" of the Double Jeopardy Clause, Green, 355 U.S. at 198, would rob it of all significance.

F. Burks Clearly Applies To The De Novo System.

The conclusion that double jeopardy bars Michael Lydon's retrial is fully consistent with the Court's previous treatment of how the Double Jeopardy Clause applies to the Massachusetts de novo system. The Court has recognized that the double jeopardy principles governing defendants in the de novo system are the same as those which apply to cases like Burks. In Ludwig v. Massachusetts, 427 U.S. 618 (1976), the Court decided that double jeopardy has the same consequences for de novo defendants as those who successfully appeal.

> A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of a trial record and gains a reversal of his conviction and a remand of his case for a new trial. Ludwig, 427 U.S. at 631-32.

Thus, the answer to the question of how double jeopardy applies to a de novo defendant is found by analyzing how double jeopardy applies to a defendant who successfully challenges his conviction in an appellate court.

Ludwig supplied the answer to this question by citing United States v. Ball, 163 U.S. 662 (1896), which stood for the general proposition that retrials after successful appeals did not offend the Double Jeopardy Clause. Ludwig concluded that double jeopardy did not bar a trial de novo. However, neither Ludwig nor Ball addressed the situation where the evidence

at the first trial was insufficient. Their failure to recognize the special rule that the Double Jeopardy Clause applies in such cases is understandable in light of the fact that both cases predate Burks. In fact, the Court noted in Burks that much of the confusion surrounding this area of double jeopardy doctrine in prior cases was caused by a failure to keep this distinction clear. Burks, 437 U.S. at 14-15. Thus, while Ludwig's essential analogy is still appropriate, it is incomplete. Ludwig, viewed in light of Burks, must therefore stand for the proposition that retrial after a de novo appeal is proper under the same circumstances as retrial after appellate reversal. In both situations, the Double Jeopardy Clause prevents retrial when there was insufficient evidence at the first proceeding. This interpretation of Ludwig

is the only way to reconcile it with Burks.

G. Mr. Lydon Did Not Waive His Double Jeopardy Protection by Appealing for a Trial De Novo.

Mr. Lydon did not lose the protection Burks affords him by asking for a de novo trial after his conviction. Massachusetts criminal procedure gives defendants no way to avoid the imposition of sentence following conviction in a first tier court except by noting a de novo appeal. Enbinder v. Commonwealth, 368 Mass. 214 (1975). A defendant who appeals rather than accepting a sentence based upon a tainted conviction has not had the type of meaningful choice that is a necessary ingredient of a valid waiver of his double jeopardy rights. Green, 355 U.S. at 192. Both Burks and Hudson recognized that this principle applies as well to a defendant who has requested a new trial.

Burks not only appealed his conviction, but also moved for a new trial. The Court's decision overruled prior cases which implied that retrial after appellate reversal for insufficient evidence was permissible if, in addition to appealing his conviction, the defendant also requested a new trial. Bryan v. United States, 338 U.S. 552 (1950); Yates v. United States, 354 U.S. 298 (1957). These prior cases rested on a waiver theory: that by allowing a new trial, an appellate court merely provided the defendant with the relief that he wanted. The Court squarely rejected this theory in Burks, holding that a defendant's request for a new trial does not affect the conclusion that the Double Jeopardy Clause forbids reprosecution. Burks, 437 U.S. at 17-18. Even if a defendant in the federal system asked for a new trial as his sole remedy, the Double

Jeopardy Clause would prevent any further prosecution if the evidence at his first trial was insufficient. Burks, 437 U.S. at 17. In Hudson in fact, the defendant obtained his ruling that the evidence was insufficient not on appeal but on a motion for a new trial. Hudson, 450 U.S. at 45 n.6.

The de novo system is merely a particular institutionalized version of the new trial. The principle the Court announced in Burks cannot depend on the sufferance of a state legislature which chooses to provide criminal defendants in a first tier court no avenue of relief other than a second trial.

H. Mr. Lydon Did Not Waive Or Forfeit His Double Jeopardy Protection by Choosing the De Novo Procedure Initially.

This conclusion does not change because Mr. Lydon had an original option to avoid the de novo system altogether.

He neither waived nor forfeited the protection Burks affords by this choice.

Double jeopardy is a fundamental right which protects the accuracy of a trial's outcome. Waiver of such a constitutional right is a matter of federal law, and a habeas corpus court must determine if a valid waiver occurred. See Brewer v. Williams, 430 U.S. 387, 404 (1977); Alvarez v. Estelle, 531 F.2d 1319, 1321 (5th Cir. 1976). This Court has held that the appropriate standard for judging the validity of a waiver of double jeopardy is whether there has been "an intentional abandonment or relinquishment of a known right or privilege." Green v. United States, 355 U.S. at 191-92. Where a fundamental right like double jeopardy is at issue, the state bears the burden of proof. Brewer, 430 U.S. at 403. Here, the Commonwealth made no effort to meet

this requirement.

The District Court found:

> There is no evidence that Lydon had a "meaningful choice" and made a voluntary knowing relinquishment of a right," Green v. United States, 1957, 355 U.S. 184, 191-92 in submitting initially to a bench trial since it is not clear that he appreciated that in so doing he was waiving rights protected by the double jeopardy clause.

Lydon v. Justices, 536 F. Supp. at 651.(J.A.5

This finding was amply justified. There was nothing in the record of the case or any feature of the Massachusetts de novo system to support a conclusion that there was a knowing waiver. Lydon v. Commonwealth, 381 Mass. at 371 (Liacos, J., concurring in part and dissenting in part) (J.A. 51a).

This court has established a policy that "indulges every reasonable presumption against waiver." Barker v. Wingo, 407 U.S. 514, 525 (1972) (emphasis added). That presumption alone would support the conclusion of the District Court.

1. Mr. Lydon Reasonably Believed that He Could Both Participate in the De Novo System and Rely on Burks.

Aside from the presumption, however, the most reasonable conclusion from the record is that Mr. Lydon chose the de novo system on the assumption that he could rely on Burks to prevent a second trial if the evidence at the first was insufficient. See Lydon v. Justices, 698 F.2d at 10 (J.A.80a).

Massachusetts law prior to the Supreme Judicial Court's Lydon opinion offered defendants in the de novo system every reason to believe that they could raise a double jeopardy challenge in the second tier of the system based on the insufficiency of the evidence at their first trials. See Casenote, 16 New England L. Rev. 303, 319 (1981). Two Superior Court judges had already accepted the contention. Id. at 320 n.133. The point was so in contention that three Justices of the Supreme Judicial

Court considered the question important enough to be reported to the full bench for decision. Lydon v. Commonwealth, 381 Mass. 356 (1980) (reported by Justice Wilkins); Gibson v. Commonwealth, 381 Mass. 372 (1980) (reported by Justice Quirico); A Juvenile v. Commonwealth, 381 Mass. 379 (1980) (reported by Justice Abrams).

This Court recognized in Engle v. Isaac, 456 U.S. 107, 131-34 (1982), that defense attorneys have an obligation to anticipate changes in the position a state judiciary may take on a constitutional issue. Any attorney who met that obligation would have advised Mr. Lydon that his initial choice to participate in the de novo system did not necessarily commit him to accept a second trial as his sole remedy for an irrational conviction in the first tier of the system.

The record makes clear that at every step along the way, Mr. Lydon acted in a manner consistent with his reliance on Burks. His attorney argued to the orginal trial judge that the evidence was insufficient as a matter of law. Transcript at p.10, Appendix C to Habeas Corpus Petition. As soon as his double jeopardy claim ripened, he presented a motion to the second tier of the de novo system. (J.A. 1a). He vigorously pressed his claim through the state appellate system. In this context, Mr. Lydon's original decision to participate in the de novo system can hardly be equated with a deliberate abandonment of protection against double jeopardy.

2. The Commonwealth of Massachusetts Contributed Far More Significantly to the Need For Retrial Than Mr. Lydon's Choice of the De Novo System.

In light of Mr. Lydon's reliance on

Burks, it is unfair to deny him its protection on the theory that he is responsible for his current predicament. Mr. Lydon had no reason to expect that the state courts would ever put him in his present position by refusing to consider the sufficiency of the evidence at his first trial. If it is appropriate at all to consider Mr. Lydon's responsibility for having to face a second trial, the Court must, as it did in Jeffers v. United States, 432 U.S. 137 (1977), consider also the government's responsibility. Id. at 152 n.20. Here, the two government officials whose power the Double Jeopardy Clause limits, Brown v. Ohio, 432 U.S. 161, 165 (1977), both contributed far more directly to the need for an otherwise forbidden second trial. The original trial judge failed in his responsibility to apply the standard of proof beyond a

reasonable doubt in a rational manner. Mr. Lydon clearly did nothing to prevent the judge from properly evaluating the evidence. Had the judge acted correctly, there would be no double jeopardy problem. The prosecutor bears some responsibility as well. She failed either to dismiss her inadequate case before trial, Cf. American Bar Ass'n. Standards for Criminal Justice: The Prosecution Function, Standard 3-3.9(a) ("A prosecutor should not ... permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction "), or to present sufficient evidence to prove guilt if it were possible to do so. Mr. Lydon's choice to have his trial in the de novo system did nothing to make it harder for the prosecutor to have presented a sufficient case than if he had not exercised that option. Last, the Commonwealth

shares responsibility for refusing to allow the judge in the second tier of the de novo system to review the sufficiency of the evidence at the original trial. To have allowed this review would also have avoided the double jeopardy problem. Under these circumstances, Mr. Lydon's choice to participate in the de novo system did not deprive him of his right against successive trials.

3. Massachusetts May Not Condition Mr. Lydon's Statutory Right to a De Novo Trial on His Forfeiture of the Constitutional Protection Against Double Jeopardy.

Against the background of both Mr. Lydon's reasonable reliance on Burks and the Commonwealth's overwhelming responsibility for the need to conduct a second trial, to exempt the de novo system from an otherwise clear constitutional mandate "exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy." Green, 355 U.S. at 194. Forfeiture,

the imposed loss of one's rights against one's will, is an inappropriate legal concept to apply to Mr. Lydon's case.

The Commonwealth of Massachusetts cannot structure its criminal court system to irrevocably deprive de novo defendants of their right not to be placed twice in jeopardy. The fact that Massachusetts need not have a de novo system gives it no license to offer one that is constitutionally defective. See Ward v. Village of Monroeville, 409 U.S. 57, 61 (1972) (availability of trial de novo does not allow state to have a biased judge at first tier trial); Colten v. Kentucky, 407 U.S. 104, 119 (1972) (defendants facing imprisonment must have counsel at first tier trial); Brown v. Vance, 637 F.2d 272, 282 (5th Cir. 1981) (Ward applies even though defendants could have opted for a jury trial rather than first tier de novo trial before biased judge).

There is no more reason to permit a forfeiture of Burks as the price for entry into a de novo system than the forfeiture of the protection afforded by Ward or for that matter, by Blackledge v. Perry, 417 U.S. 21 (1974), or any other case dealing with the requirements the Constitution places on trials in such a system.

Burks establishes, both explicitly and by implication, that a state may not deprive a defendant of the protection of the Double Jeopardy Clause simply because he chose to avail himself of a procedure which the state need not have provided. A state need not give its trial judges the power to sit as a 13th juror and grant a new trial based on the weight of the evidence. Tibbs, 457 U.S. at 42. Yet Burks specifically prohibits a state from forfeiting a defendant's protection against a second trial on the grounds that in addition to appealing his

conviction on the basis of the sufficiency of the evidence, he sought a new trial on the basis of its weight. Burks, 437 U.S. at 17-18. A state also need not offer any appellate review. But Burks clearly implies that a state could not offer defendants an appeal only on the condition that they submit to a second trial if the conviction is reversed for insufficient evidence. Massachusetts may not exact a higher price for using the de novo system than it could for a defendant who uses a new trial motion or appeals a conviction.

Nor can the Commonwealth justify the forbidden second opportunity it wants to give the prosecutor in Mr. Lydon's case on the ground that the de novo system in general seems preferable to a great many defendants. Mr. Lydon's rights may not be forfeited for the benefit of others. Moreover, such a sacrifice is unnecessary.

The integrity of the de novo system does not depend on depriving defendants of the opportunity to obtain a review of the sufficiency of the evidence at their first tier trials. The Pennsylvania de novo system has existed for years giving defendants just such an option. Commonwealth v. Dincel, 457 A.2d 1278 (Pa. Super. Ct. 1983). Cf. Ariz. Rev. Stat. §22-374 (1975) (option of appeal on the record or if record is inadequate trial de novo); Colorado R. Crim. Pro., Rule 37 (g) (same).

Massachusetts has already indicated that double jeopardy issues should be addressed by judges in the second tier of the process. Lydon v. Commonwealth, 381 Mass. at 367 (J.A. 47a). This type of issue is an easy one for them to resolve. It involves no questions of credibility, nor does it require taking any testimony.

It is simply a matter of reviewing the evidence in the record, to determine a clear failure of proof. See Burks, 437 U.S. at 17. The trial transcript here was only 11 pages. It was typical of the relatively simple nature of trials in the first tier of de novo courts. Whatever need a state may validly assert "to experiment in the area of criminal trial procedure and to provide practical advantages to defendants," (Petitioners' Brief at 67) does not require the result the Commonwealth has urged upon this Court.

II. HABEAS CORPUS IS AVAILABLE TO VINDICATE THE CONSTITUTIONAL PROTECTION AGAINST THE ORDEAL OF A SECOND TRIAL FOR THE SAME OFFENSE

Michael Lydon's habeas corpus petition sought the protection of the District Court against being placed twice in jeopardy in violation of his right under the Fifth Amendment to the United States

Constitution. Mr. Lydon used the appropriate vehicle to secure federal vindication of the constitutional right the state denied him.[1] The "resolution of double

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1./ The habeas corpus petition in the District Court based its claim of jurisdiction on both 28 U.S.C. §2241 and 28 U.S.C. §2254. (J.A. 22a) The former section requires that a petitioner be in custody "in violation of the constitution..." 28 U.S.C. §2241 (c)(3). Having alleged facts to show his custody violated his rights under the Double Jeopardy Clause, Mr. Lydon established the court's jurisdiction under section 2241. Section 2254 requires that a petitioner be in custody pursuant to a state court judgment. The action of the state court judge who presided over Mr. Lydon's original trial satisfies the requirement that the custody result from a judgment.

Following his conviction and sentence in the first tier court, Mr. Lydon requested a trial de novo. Pursuant to the statutory mandate, the original trial court entered the case in the jury session, transmitted the papers, and ordered the defendant to appear. M.G.L. Ch. 278, § § 18, 20. The judgment of the first tier court had an immediate effect in restricting Mr. Lydon's liberty by placing him on personal recognizance. Moreover, if Mr. Lydon failed to appear in the jury session or withdrew his de novo appeal, the original conviction and sentence could have been imposed. M.G.L. Ch. 278, § § 24, 25. The effect of such a state court order satisfies the requirement in 28 U.S.C. 2254 that there be a judgment. Cf. Delk v. Atkinson, 498 F. Supp. 1282, 1286 n.5 (M.D. Tenn. 1980), rev'd on other grounds, 665 F.2d 90 (6th Cir. 1981).

jeopardy claims by state trial courts are reviewable not only within the state court system, but in the federal court system by habeas corpus as well." Oregon v. Kennedy, 456 U.S. 667, 675 (1982).

A. Double Jeopardy Prohibits Not Only Multiple Convictions, But the Ordeal of a Second Trial Itself

Because the Double Jeopardy Clause provides protection not only against multiple convictions for the same offense, but the ordeal of multiple trials, Green v. United States, 355 U.S. 184, 187 (1957), Mr. Lydon brought his petition prior to his retrial. To do otherwise would have subjected him to the very evil, a second trial, which the Double Jeopardy Clause was designed to prohibit. Abney v. United States, 431 U.S. 651, 662 (1976). Since the constitutional right at issue, and the rationale for it, would have been violated if Mr.

Lydon had waited until after his second trial to raise his double jeopardy claim, habeas corpus was appropriate prior to retrial in the state courts.

Among all the limitations the Constitution places on the power of the government in criminal cases, only two provisions shield the defendant from simply participating in a criminal trial. The Speech and Debate Clause is one, See United States v. Helstocki, 442 U.S. 500 (1979), and the Double Jeopardy Clause is the other. Cf. United States v. MacDonald, 435 U.S. 850, 860 n.7 (1978) (speedy trial claims do not require pre-trial relief while double jeopardy claims, being unique, do). In order to provide a meaningful remedy, habeas corpus must be available prior to a state trial that threatens either of these rights. Vindication of other constitutional claims, however, can await final conviction.

B. Habeas Corpus Jurisdiction Exists Before Retrial For the Same Offense.

So long as the person seeking federal protection is in custody, it is clear that habeas corpus jurisdiction exists prior to a state criminal trial. See Ex Parte Royall, 117 U.S. 241 (1886); Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973). The Commonwealth concedes that pre-trial habeas corpus is proper for cases raising a valid double jeopardy claim. Petitioners' Brief at 52. That concession recognizes the near universal stance of federal courts on this question.

This Court has considered the merits of a habeas corpus petition raising a double jeopardy question prior to trial in a state court. Arizona v. Washington, 434 U.S. 497 (1978). Almost every Court of Appeals has either explicitly approved pre-

trial habeas corpus for double jeopardy claims or followed the Supreme Court's lead and assumed jurisdiction by considering the merits.[2]

C. Mr. Lydon Completely Exhausted All State Remedies.

Aside from presenting a claim which the District Court had jurisdiction to entertain, Mr. Lydon's habeas corpus petition established that no interest

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2/ Sedgwick v. Superior Court, 417 F.Supp. 386 (D.C. 1976), rev'd on other grounds, 584 F.2d 1044 (D.C. Cir, 1978); Benson v. Superior Court of Massachusetts, 663 F.2d 355 (1st Cir. 1981); Drayton v. Hayes, 589 F.2d 117 (2nd Cir. 1979); United States ex rel Russo v. Superior Court of New Jersey, 483 F.2d 7(3rd Cir. 1973), cert. den., 414 U.S. 1023 (1973); Klobuchir v. Pennsylvania, 639 F.2d 966 (3rd Cir. 1981); Winston v. Moore, 452 U.S. 944 (1981) (dissent of J. Rehnquist from denial of cert. in case where 4th Cir. granted pre-trial habeas corpus relief); Baker v. Metcalfe, 489 F.Supp. 930 (D.C. Tex. 1980), rev'd on other grounds, 633 F.2d 1198 (5th Cir. 1981), reh. den., 638 F.2d 1234 (5th Cir. 1981), cert. den., 454 U.S. 974 (1981); Grandberry v. Bonner, 653 F.2d 1010 (5th Cir. 1981); Gully v. Kunzman, 592 F.2d 283 (6th Cir. 1979); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968); Hartley v. Neely, 701 F.2d 781 (9th Cir. 1983).

of federalism required the court to withhold its consideration. In order to ensure a proper respect for the operation of a state's criminal trial system, federal courts must provide state judges the first opportunity to confront a state defendant's constitutional claims. See Picard v. Conner, 404 U.S. 270 (1971). This exhaustion requirement serves the interest of comity in allowing the states an opportunity to rule on constitutional issues in the most efficient manner. However, once a defendant has exhausted the remedies the state offers him there is no need to postpone federal review. Indeed, it would hardly serve the interest of efficiency to require Mr. Lydon to undergo a second trial before obtaining federal relief. It is clear that the constitution prohibits such a trial, and the state's highest court has already

rejected Mr. Lydon's claim.

Mr. Lydon has meticulously and exhaustively presented precisely the same issue contained in his habeas corpus petition at every state opportunity available to him. At his original trial, Mr. Lydon argued that the prosecution's evidence was not sufficient to sustain a conviction. Transcript at 10, Appendix C to Habeas Corpus Petition. The double jeopardy consequence of this failure was not ripe for argument until Mr. Lydon appeared in the jury session where his second trial was to occur. Mr. Lydon presented the issue of the insufficiency of the evidence and its double jeopardy implication to the jury session judge, who rejected it without a hearing. Lydon v. Justices, 536 F.Supp. at 649 (J.A. 53a). Mr. Lydon sought interlocutory relief from a Single Justice of the Supreme Judicial

Court, who ruled that the evidence was indeed insufficient but reported to the full bench the question of whether the Double Jeopardy Clause barred a retrial. (J.A. 19a-20a) After considering the exact constitutional question that the subsequent habeas corpus petition raised, the Supreme Judicial Court, in a 5-2 decision, rejected Mr. Lydon's argument. Lydon v. Commonwealth, 381 Mass. 356, cert. denied, 449 U.S. 1065 (1980). Mr. Lydon even pursued his quest to the extent of an unsuccessful petition for certiorari.

Comity requires only that federal courts allow the states a fair opportunity to rule on an issue. Smith v. Dignon, 434 U.S. 332 (1978). The courts of the Commonwealth of Massachusetts have received that opportunity. Mr. Lydon need do no more. The Commonwealth's argument that comity required the District Court to wait until

after Mr. Lydon's second trial to consider his double jeopardy claim would leave him without any remedy for a violation of one of the Fifth Amendment's most basic protections. The doctrine of comity assumes that state courts are both competent to decide federal issues and dedicated to upholding constitutional rights. It does not serve that policy to ensure that a remedy comes too late to vindicate fully a defendant's rights. Mr. Lydon need not suffer a forbidden trial to exhaust his state remedies.

D. The District Court Properly Considered the Merits of Mr. Lydon's Double Jeopardy Claim.

The District Court performed its obligation to protect Mr. Lydon's double jeopardy rights when it assumed jurisdiction and reviewed the transcript of the evidence at his original trial. If, as the Common-

wealth concedes, habeas corpus jurisdiction exists to consider a valid double jeopardy issue prior to a pending state trial, then the federal courts must have the power to review the evidence that a petitioner presents in support of his claim. Mr. Lydon's habeas corpus petition alleged that the evidence at his first trial was insufficient as a matter of law (J.A. 22a, 27a ¶ 29). He attached a transcript of the trial as an appendix to his petition. He presented a memorandum to the District Court arguing that it had an independent obligation under Jackson v. Virginia to examine the transcript for sufficiency of the evidence. (Memorandum in opposition to the Commonwealth's motion to dismiss at 7.) The District Court had to review the transcript to determine if Mr. Lydon's double jeopardy claim had substance.

The only other habeas corpus case dealing with a court's responsibility in such circumstances approved the precise course that the District Court took in Mr. Lydon's case. In Delk v. Atkinson, 665 F.2d 90 (6th Cir. 1981), the court considered a pre-trial habeas corpus challenge based on a claim that the evidence at the petitioner's first state trial was not sufficient to support a conviction. The petitioner in Delk had been convicted of murder in a state court, and on appeal the Tennessee Supreme Court reversed the conviction for trial error, and remanded the case for a new trial. The state court specifically rejected the petitioner's claim that the evidence at his trial had been sufficient. Prior to retrial, while he was out on bail, the petitioner sought federal habeas corpus to bar a second trial on

double jeopardy grounds. Both the District Court and the Court of Appeals held that habeas corpus jurisdiction was proper, and that the constitutional obligation of a federal court in such a case was to review for itself whether the evidence in the state case met the minimum prescribed by Due Process to support a conviction. Delk, 665 F.2d at 94.

E. There Was No Bar To Granting Relief Once the District Court Determined a Retrial Would Violate the Double Jeopardy Clause.

After concluding that Mr. Lydon's conviction did not meet the standard which Due Process requires, the court properly decided that granting the writ was appropriate. Since double jeopardy prohibited the prosecutor in the Boston Municipal Court from trying Mr. Lydon a second time, the custody by which that court held him for trial was unconstitu-

tional. No reason existed for withholding relief simply because the trial had not yet begun.

The doctrine of Younger v. Harris, 401 U.S. 37 (1971), does not prevent a federal court from granting a writ of habeas corpus prior to a pending state trial to prevent a violation of the Double Jeopardy Clause. This Court's consideration of the merits of a pre-trial habeas corpus claim in Arizona v. Washington, 434 U.S. 497 (1978), without any mention of Younger indicates that if a federal court finds a double jeopardy violation it may grant relief in a pending state case. See Willhauck v. Flanagan, 448 U.S. 1323, 1325 (1980)(statement of Brennan, J., denying a stay pending appeal) ("The principles of Abney...and Harris v. Washington, 404 U.S. 55 (1971)(per curiam) suggest that an exception to Younger for

double jeopardy claims may be appropriate, at least when all state remedies have been exhausted."). Cf. Mincey v. Arizona, 434 U.S. 1343, 1344 (1977)(statement of Rehnquist, J., denying an application for a stay pending a petition for certiorari) (even if the Court granted certiorari to review the petitioner's Fourth Amendment claim, his retrial in the state courts could proceed since the federal right in this case is not like double jeopardy "where protection extends not only to incarceration following trial in violation of the prohibition but to the subjection of the defendant to the second trial at all...[Fourth Amendment] claims must be asserted through normal post-trial avenues of review. Cf. Younger v. Harris, 401 U.S. 37.").

Those Courts of Appeals that have explicitly considered Younger's application

to a pre-trial habeas corpus case raising the question of double jeopardy's bar on successive trials have all concluded that restraint is not necessary. See Jackson v. Superior Court of Massachusetts, 549 F.2d 215 (1st Cir. 1976); Baker v. Metcalfe, 633 F.2d 1198 (5th Cir. 1981); Robinson v. Wade, 686 F.2d 298, 302 n.7 (5th Cir. 1982); Webb v. Court of Common Pleas, 516 F.2d 1034, 1039 n.18 (3rd Cir. 1975). See also Yackle, Post-conviction Remedies (1983 Supp.) p.72. Cf. Steven v. Circuit of Milwaukee, 675 F.2d 946 (7th Cir. 1982) (Younger is a bar where successive trials are not at issue); But see Rasmussen v. White, 502 F.Supp. 237 (E.D. Tex. 1980).

This conclusion makes sense in light of the limits which Younger acknowledged on its policy of restraint. Younger recognized that federal intervention was appropriate in extraordinary circumstances where the person seeking the federal court's pro-

tection had no other remedy and would otherwise suffer an irreparable injury to his constitutional rights. Younger, 401 U.S. at 53. Where a state defendant cannot protect the constitutional right by raising it at trial, Younger recognizes that federal intervention may be proper. Younger, 401 U.S. at 46. Mr. Lydon had no adequate remedy left when he turned to the federal court. The state judiciary had definitively rejected his claim. If the federal court did not grant relief, Mr. Lydon would have irrevocably lost his right to be free of the ordeal of a second trial. Younger, therefore did not pose a barrier to federal relief.

All the equitable considerations in Mr. Lydon's case supported the grant of habeas corpus relief. Mr. Lydon had already undergone one complete trial and

received a two year sentence. A retrial was no trivial matter for him. Cf. Stevens, 675 F.2d at 947. (federal court need not intervene where double jeopardy claimant had not undergone one complete trial). In addition, in establishing the merits of his double jeopardy claim, his habeas corpus petition presented the rather astonishing fact that in the state courts, the prosecutor had conceded that the evidence on which Mr. Lydon's conviction rested was insufficient as a matter of law. (J.A. 26a ¶ 22). Surely such a concession is uncommon enough to warrant a federal court's weighing it in the balance.

Moreover, whatever may be the equities in cases where the state courts have refused to grant interlocutory review of a defendant's double jeopardy claim, Mr. Lydon's trial was stayed for 11 months by the

state's highest court while it gave his case full consideration. (J.A. 4a-5a). At the very least, that was evidence that the Commonwealth of Massachusetts recognized that careful weighing of the double jeopardy claim was more important than a speedy resolution of the pending trial. It also minimized the disruptive effect of federal review on the orderly process of the state's criminal justice system.

Last, Mr. Lydon's petition did not present the type of claim which presaged frivolous litigation by others. The Massachusetts Supreme Judicial Court indicated in its Lydon decision that if the Double Jeopardy Clause prohibited retrying Mr. Lydon, then the judge in the second tier of the de novo system should entertain such claims by others. Lydon, 381 Mass. at 367. (J.A. 47a). In light of the fact that Massachusetts had

in place a means for tightening up the process that lead to Mr. Lydon's predicament, resort to federal courts should not be necessary for future litigants. Moreover, the state courts could avoid the problem altogether by instituting a valid waiver procedure. See Lydon v. Justices, 698 F.2d at 10 (J.A. 81a). This in fact is the course Massachusetts has taken. Commonwealth v. Montanez, 388 Mass. 603, 605, 447 N.E. 2d 660 (1983). Thus, there was no need to withhold relief for fear that federal courts would be flooded with frivolous double jeopardy claims. In any event, since these claims arise prior to a state trial, they will almost always be presented by an attorney rather than by a pro se petitioner. Counsel's preparation of a habeas corpus petition is one guarantee that the issue will not be frivolous. See Allen et. al., Federal Habeas Corpus and

its Reform, 13 Rutgers L. J. 675, 753 (1982).

F. The Limits On Interlocutory Review Do Not Apply To Habeas Corpus

The cases dealing with interlocutory review of a double jeopardy claim based on insufficient evidence at a defendant's original trial do not support a conclusion that the District Court lacked habeas corpus jurisdiction. First, these cases deal only with the question of the timing of an appellate court's examination of the sufficiency of the evidence at a defendant's first trial. Even the cases the Commonwealth relies upon, Petitioners' Brief at 34, concede that eventually, if the defendant is convicted after his second trial, a court must reach this issue. It is against this background that some courts have denied a review prior to the defendant's second trial. The Common-

wealth maintains, however, that no court should ever look at the original trial judge's concededly mistaken ruling that the evidence was sufficient. If no review were the only alternative to a pre-trial review, the cases denying interlocutory review probably would not maintain the same position. See Richardson, 702 F.2d at 1984 (interlocutory review preferable to no review). If Massachusetts had conceded that in the event of a second conviction, it would review the evidence at Mr. Lydon's first trial, then the analogy to the decisions dealing with an interlocutory appeal would be more apt.

Second, the essential premise underlying the cases the Commonwealth relies on simply has nothing to do with the scope of federal habeas corpus jurisdiction. Those courts that have denied interlocutory review of double jeopardy claims based on

insufficient evidence have based their position on the rule that a criminal defendant has no constitutional right to appeal. Richardson, 702 F.2d at 1082 n.21. If that is so, a defendant has no right to an interlocutory appeal, even if failure to provide him one means that he must suffer the loss of his double jeopardy right not to undergo the ordeal of a second trial. Richardson, 702 F.2d at 1084. Thus, the Commonwealth argues that the Constitution does not require Massachusetts to offer interlocutory review of a double jeopardy claim. Petitioners' Brief at 42. However, accepting the position that Massachusetts need not offer such review does not mean that a federal habeas corpus court should refuse to consider the claim as well.

There is no reason to believe that Congress intended the federal courts to exercise their habeas corpus jurisdiction

only in those situations where the Constitution mandates that appellate review must exist. Clearly, if the Constitution would allow a state to eliminate any review of a conviction, such an argument would entirely eliminate all habeas corpus jurisdiction. The simple answer to the Commonwealth's argument is that habeas corpus is a broader remedy than the minimum level of procedural protection that the Constitution requires. There is nothing unusual about Congress enacting a statute that gives citizens a federal forum that goes beyond what the states must provide. The apparent inconsistency between the First Circuit's position in Lydon and the cases denying an interlocutory appeal is nothing more than an instance where one statute provided a broader remedy than did another.

Third, the cases the Commonwealth relies on all depend on interpreting a

phrase in the federal statute dealing with criminal appeals that does not appear in the statutes relevant to this case. The former statute, 28 U.S.C. §1291, restricts federal appellate jurisdiction to "final decisions." The habeas corpus statutes, 28 U.S.C. §§2241, 2254, never mention the words "final decisions." This Court interpreted §1291 in Abney v. United States, 431 U.S. 651 (1976) to require that an issue be collateral to the merits of the case to qualify for an interlocutory appeal. Whether an issue is collateral is not relevant to the application of the habeas corpus statutes.

There is no reason to apply to habeas corpus cases the caselaw interpreting the phrase "final decisions" in the context of §1291. Habeas corpus jurisprudence amply considers the question of efficient judicial administration in

its own doctrine of comity and exhaustion. The Abney test to determine when a double jeopardy ruling is a final decision is not necessary in a habeas corpus context.

III. MR. LYDON'S CONDITIONS OF RELEASE SO RESTRICTED HIS LIBERTY THAT HE MET THE CUSTODY REQUIREMENT OF HABEAS CORPUS

In holding that Mr. Lydon met the jurisdictional requirement of custody in the habeas corpus statutes,[3] the First Circuit followed the clear mandate of this Court in Hensley v. Municipal Court, 411 U.S. 345 (1973). The petitioner in Hensley was free on his own recognizance awaiting the execution of a sentence he had received after his trial and conviction. The Court

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3./ Mr. Lydon is presently in the custody of the judges before whom he is awaiting trial, by virtue of the fact that they have released him on personal recognizance. Baker v. Metcalfe, 489 F.Supp. 930 (N.D. Tex. 1980), rev'd on other grounds 633 F.2d 1198 (5th Cir. 1981)

noted that someone released on personal recognizance is "subject to restraints not shared by the public generally." 411 U.S. at 351, and thus meets the custody requirement. Mr. Lydon is free on his recognizance, having appealed for a trial de novo after a conviction and a two year sentence. The Court's reasons for upholding habeas corpus jurisdiction in Hensley apply as well to this case.

A. The Conditions of Mr. Lydon's Release Placed A Significant Restraint On His Liberty

After Mr. Lydon exercised his option to avoid immediate imposition of the sentence, the trial court released him according to the terms of the Massachusetts statute dealing with de novo appeals. M.G.L. Ch. 278 §18. Petitioners' Brief at A5. That statute imposed restric

tions on his freedom, not shared by the public generally. Comparison to the situation in Hensley shows that Mr. Lydon was in custody for the purpose of habeas corpus jurisdiction.

The Court noted that the defendant in Hensley was not free to come and go as he pleased, since he was under an obligation to appear "at all times and places as ordered by '[a]ny court or magistrate of competent jurisdiction'" 411 U.S. at 351. Moreover, disobedience was itself a criminal offense. Id. The Massachusetts statute requires Mr. Lydon to appear in the jury session on the appointed day and also "at any subsequent time to which the case may be continued...and so from time to time until the final sentence...," M.G.L. c.278 318. Massachusetts also makes failure to appear a separate criminal offense. However, Massachusetts sets a

lower standard than California's "willful failure to appear." Cal. Penal Code §1319.6 In Massachusetts, failure to appear merely "without sufficient excuse" constitutes a criminal offense, M.G.L. c.276 §82A. Thus, Mr. Lydon faced at least as much restraint as Hensley.

The Massachusetts statute, however, imposes restrictions on his liberty that go beyond those in Hensley. Massachusetts requires in addition that the accused "not depart without leave, and in the meantime ...keep the peace and be of good behavior." M.G.L. Ch.278 §18.

The phrase "not depart without leave" means that the court may require the accused to appear not only on the charge to which the recognizance pertains, but on any other charge. Commonwealth v. Teevens, 143 Mass. 210, 214 (1887). This highly restrictive condition "put [s]him as much under

the power of the court as if he had been in custody...," State v. Stout, 11 N.J. Law 147 (1829), cited in Teevens.

The restraints requiring Mr. Lydon to keep the peace and maintain good behavior require that he refrain from unlawful conduct. See Commonwealth v. McNeil, 19 Pick. 127, 130 (Ma. 1837). These restraints go beyond those imposed on Hensley, and match those in Jones v. Cunningham, 371 U.S. 236 (1963) (holding that the restraints of parole meet the custody requirement).

The terms of Jones' parole required him to refrain from violating any penal laws or ordinances. The Court in Jones noted:

> Even the condition which requires petitioner not to violate any penal laws or ordinances, at first blush innocuous, is a significant restraint because it is the Parole Board members or the parole officer who will determine whether such a violation has occurred. 371 U.S. at 242 n.19.

This determination by the Parole Board would include "few, if any, of the procedural safeguards that normally must be and are provided to those charged with crime," id., at 242.

As a general rule, a court has the power to arrest and detain a defendant released on recognizance who has violated a condition of good behavior such as the one imposed on Mr. Lydon. American Bar Association, Standards for Criminal Justice: Pretrial Release, commentary to Standard 10-5.7, at 10-93 (1979). Massachusetts law allows a court to revoke a defendant's recognizance and detain him up to 60 days upon finding probable cause to believe that he has committed a crime during a period of release. M.G.L. Ch. 276 §58. Thus, even though the requirements to keep the peace and maintain good behavior do not impose a substantive restraint on Mr. Lydon's

liberty, they rob him of the procedural safeguards that protect the general public.

The sentence the Commonwealth imposed on Mr. Lydon following his conviction also restricts his liberty. After receiving a two year sentence, Mr. Lydon exercised his option to request a trial de novo. The Commonwealth's argument that a de novo appeal completely wipes out the action of the original trial court is inaccurate in one important respect. The court will reimpose the two year sentence if he fails to appear in the second tier of the de novo system. M.G.L. Ch. 278 §24. The original sentence is thus simply held in abeyance. It. is not a mere theoretical possibility. Mr. Lydon is essentially in the same position as the defendant in Hensley. Each remained "at large under an order of the state court staying execution of his

sentence." 411 U.S. at 347.

B. Hensley Specifically Applies To Pre-Trial Release

Hensley explicitly contemplated that defendants in Mr. Lydon's position would meet the custody requirement of the habeas corpus statutes. In discussing the opinion's impact, the Court stressed that even "where a state defendant is released on bail or on his own recognizance pending trial or pending appeal, he must still contend with the requirements of the exhaustion doctrine." 411 U.S. at 353. (emphasis added). The Court also indicated the relevance of its holding for defendants on personal recognizance prior to a pending criminal trial by its overruling of four former decisions which all held that in such circumstances the custody requirement was not met.[4] The Court stated

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4 Stallings v. Splain, 253 U.S. 339 (1920); Johnson v. Hoy, 227 U.S. 245 (1913); Baker v. Grice, 169 U.S. 284 (1898); Wales v. Whitney, 114 U.S. 564 (1885)

"Insofar as they ... may indicate a narrower reading of the custody requirement, they may no longer be deemed controlling. In none of the decisions on which we today rely ... are these earlier cases cited in the opinions of the Court." 411 U.S. at 350 n.8.

This interpretation of Hensley is uniform throughout the federal system.[5]

5./ United States ex rel Russo v. Superior Court of New Jersey, 483 F.2d 7 (3rd Cir. 1973), cert den., 414 U.S. 1023 (1978); United States ex rel Triano v. Superior Court New Jersey, 393 F.Supp. 1061 (D.C.N.J. 1975), aff'd 523 F.2d 1052 (3rd Cir. 1975), cert den., 423 U.S. 1056 (1976); Baker v. Metcalfe, 489 F.Supp 930 (D.C. Tex. 1980), rev'd on other grounds, 633 F.2d 1198 (5th Cir. 1981), reh. den., 638 F.2d 1234 (5th Cir. 1981), cert. den., 454 U.S. 974 (1981); Delk v. Atkinson, 498 F.Supp. 1282 (D.C. Tenn. 1980), rev'd on other grounds, 665 F.2d 90 (6th Cir. 1981); Sedgwick v. Superior Court 417 F.Supp. 386 (D.C. 1976); Thames v. Justice Superior Court, 383 F.Supp. 41 (D. Mass. 1974); Burris v. Ryan, 397 F.2d 553 (7th Cir. 1968).

A leading work on modern habeas corpus stated in 1981, "At this writing it is clear that petitioners subject to the legal restraints attending bail or personal recognizance, either before or after trial ... are in custody for purposes of habeas corpus." Yackle, Postconviction Remedies at 185 (1981). Even the Committee Note to Rule 1, of the Rules Governing Section 2254 Cases in Federal Court, recognizes that the custody requirement "now includes a person who is: . . . at large on his own recognizance . . ." citing both Hensley and Smith v. Dibella, 314 F. Supp. 446 (D. Conn. 1970).[6]

6./ The custody requirement of Section 2241 is the same as in Section 2254. Cf. Triano v. Superior Court, 393 F. Supp. 1061 (D.N.J. 1975) aff'd without opinion 523 F.2d 1052 (3d Cir. 1975), cert. denied, 423 U.S. 1056 (1976).

The Commonwealth is unable to cite even a single case which holds that a defendant released on personal recognizance prior to a pending trial does not meet the custody requirement.

The absence of any dissatisfaction in reported cases with this interpretation of the custody requirement is evidence of the lack of disruption such a policy places on the federal system. As the Court pointed out in Hensley, even a petitioner in custody must exhaust state remedies before invoking a federal court's habeas corpus protection. 411 U.S. at 353. As a practical matter, only defendants raising double jeopardy claims can hope to clear the exhaustion hurdle prior to trial. Thus, the First Circuit's position on custody allows pre-trial habeas corpus only for the narrow class of defendants who can raise a double jeopardy claim

which they have already fully presented to the state courts.

Moreover, the Commonwealth's position on custody would lead to an absurd result. Defendants on personal recognizance or bail pending a state criminal trial who wanted to establish federal habeas corpus jurisdiction would simply surrender themselves to the state courts (or have their sureties do so), present a habeas corpus petition while in custody, and regain their release once they had filed the petition. Cf. Carrafas v. LaVallee, 391 U.S. 234 (1968) (custody determined at time petition is filed; subsequent release does not affect jurisdiction). This behavior would serve no useful purpose.

CONCLUSION

For the reasons stated above the decision of the Court of Appeals for the First Circuit should be affirmed.

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Office - Supreme Court, U.S.
FILED
NOV 29 1983
ALEXANDER L. STEVAS
CLERK

No. 82-1479

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

THE JUSTICES OF THE BOSTON
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Petitioner,

V.

MICHAEL LYDON,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. THE CONDITIONS OF PERSONAL RECOGNIZANCE DO NOT CONSTITUTE A SEVERE RESTRAINT ON PERSONAL LIBERTY.

Respondent overstates the restrictions placed upon his liberty by virtue of a personal recognizance.

First, respondents' assertion that Mass. Gen. Laws c. 276 § 58, specifying

as a specific condition of recognizance the power of the court to revoke a defendant's recognizance and detain him up to 60 days upon finding probable cause to believe he has committed a crime during a period of release, "robs him of procedural safeguards that protect the general public" (Respondents Brief, 96), is inaccurate. That portion of §58 referred to by respondent was added by statute in 1982. 1982 Mass. Acts c.179. Respondent's recognizance issued in 1979 and contains no such condition.

Second, respondent misconstrues the phrase "not depart without leave," a condition of recognizance contained in ch. 278 §65. That ancient phrase means only that discharge from the recognizance must issue by order of the court and does not automatically follow from the absence of indictment or

complaint in the court to which the individual is summoned. State v. Stout, 6 Halst. 124, 11 N. J. L. 124 (1830). See also, Commonwealth v. Teevens, 143 Mass 210, 213 (1887) in which the court held that a recognizance was sufficient to bind a defendant to appear and answer an indictment for the same or a lesser offense described in a complaint.

Finally, no reasonable analogy can be drawn between pre-trial release upon personal recognizance without surety and the conditional release upon parole following conviction situation in Jones v. Cunningham, 371 U.S. 236 (1963).

Jones, having been convicted, sentenced and incarcerated, was released to the custody and control of the Parole Board. He was confined by the parole order to live in a particular community, in a particular house and to work at a

specific job. He could not drive a car without permission of the parole officer. He was required to periodically report to the parole officer and permit the officer to visit his home and place of work. His movements, social contacts and conduct were totally subject to review by the parole officer or Parole Board who alone were empowered to determine if any violation of the conditions of parole had occurred and return him to prison to serve out his sentence. The contrast to the conditions of personal recognizance is striking. The defendant here is required merely to appear at the jury session on the return day and at any subsequent time to which the case may be continued until final sentence, order or decree. He may not depart from his recognizance except by order or leave of

the court and he must "keep the peace and be of good behavior." Mass. Gen. Laws. c. 276 §65, c. 278 §17. Unlike the parole situation, any alleged violation of the conditions of recognizance is subject to judicial determination. (Compare, Jones v. Cunningham, 371 U.S. at 242, n. 19.). Clearly, no official control of one's everyday life is contemplated by the recognizance. Therefore, in the absence of "significant restraints" on the respondent's liberty, he is not "in custody" within the meaning of 28 U.S.C. §§ 2241, 2254."

II. THE TRIAL DE NOVO SYSTEM IS A VALID EXERCISE OF LEGISLATIVE POWER.

Respondent's suggestion that the Commonwealth may not structure its criminal court system in such a manner as to not encompass the rule of Burks v.

United States, 437 U.S. 1 (1978) (Respondent's Brief, 60-65), is without support. This court has often noted the ability of state legislatures and courts to fashion rules governing review. For example, in Tibbs v. Florida, 457 U.S. 31 (1982), the court in rejecting a theory that the Double Jeopardy clause barred retrial after appellate reversal on evidentiary weight, noted that to rule otherwise might well "prompt state legislatures simply to forbid those courts to reweigh the evidence." Tibbs, at 45-46 n. 22. Similarly, in Hankerson v. North Carolina, 432 U.S. 233, 245, n. 8 (1977), this Court acknowledged the ability of the state courts to enforce their own contemporaneous objection rule thereby obviating a defendant's ability to raise certain constitutional claims.

Moreover, policy considerations underlying the Double Jeopardy Clause do not require any disruption of the de novo system. While it is true that Burks forbids retrial after reversal for insufficient evidence. That rule should not apply where the defendant, at his sole election, has chosen a form of trial which does not permit appellate review of any alleged error of law or fact. It was entirely open to the defendant to have chosen a first instance jury trial with appellate review in the Appeals Court. Had he done so and successfully challenged his conviction of the ground of insufficient evidence, no retrial would be permitted. However, the defendant voluntarily chose to forego appellate review and proceeded initially to a bench trial with de novo trial to

follow. The situation falls squarely within the decision in Jeffers v. United States, 432 U.S. 137 (1977) where it was held, "...although a defendant is normally entitled to have charges on a greater and a lesser offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have two offenses tried separately ..." Id. at 152. Similarly, it was at defendant's election that he chose two totally independant trials rather than a single trial with appellate review. It cannot be maintained that the Commonwealth played any part in his election of this procedure. Therefore, it is urged that although in a somewhat different context the defendant here, by his election has created an exception to application of Burks, just as the defendant in Jeffers waived application of the rule of Brown

v. Ohio, 432 U.S. 161 (1977). "...the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." United States v. Scott, 437 U.S. 82, 99 (1978).

CONCLUSION

For the reasons stated in their brief and in this reply brief, petitioners respectfully request this Court to reverse the judgment of the Court below.

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Office-Supreme Court, U.S.
FILED
OCT 7 1983
ALEXANDER L. STEVAS,
CLERK

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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INTEREST OF THE AMICI*

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 250,000 members. The Civil Liberties Union of Massachusetts is one of its state affiliates. Continuously since its founding in 1920, amicus American Civil Liberties Union has sought to protect the fundamental rights guaranteed by the Constitution, and to prevent violations of those rights, often by appearing as amicus in this court. Amici hope that an argument presented by an organization experienced and concerned with protecting constitutionally guaranteed liberties will aid the Court in resolving the important constitutional question presented by this case.

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*Letters consenting to the filing of this brief have been lodged with the clerk.

SUMMARY OF ARGUMENT

Massachusetts maintains a two tiered district court system which permits a criminal defendant to appeal to a trial de novo following conviction at a first tier bench trial. Respondent Michael Lydon was tried and convicted on a charge of possession of burglarious implements at the first tier. Exercising its habeas corpus jurisdiction, the United States District Court found that the Commonwealth had failed to present sufficient evidence to warrant conviction. The question addressed by this brief[1] is whether the Commonwealth may now retry Mr. Lydon at the second tier, when this Court has ruled in Burks v. United

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[1] Amici do not address another issue raised by the petitioner, namely whether habeas corpus relief was granted pursuant to a proper exercise of the U.S. District Court's jurisdiction, but support the arguments on that issue offered by the respondent.

States, 437 U.S. 1, 11 (1978) that "the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."

The Commonwealth argues that Burks is inapplicable to the case at bar because the Double Jeopardy Clause is not offended by permitting the prosecution a second chance to prove its case in a de novo system. Amici submit, however, that the Double Jeopardy Clause was designed to guard against precisely the ills that Mr. Lydon would suffer were he required to stand trial again. Long before Burks, the decisions of the Court concerning both mistrials and government appeals had established a clear and sensible standard: the government is entitled to no more and no less than one full and fair opportunity to prove its case.

By denying the government a "second crack" at mustering evidence sufficient to convict, the Double Jeopardy Clause protects the defendant from the physical, emotional and financial burdens of multiple trials, and reduces the possibility of an innocent man's conviction.

Similarly, the Commonwealth suggests that there is no government oppression involved in requiring the defendant to forfeit his double jeopardy protection in exchange for receiving the two opportunities for acquittal allegedly provided by the de novo system. However, Mr. Lydon never received the theoretical benefit of "two bites at the apple", which is precisely why the double jeopardy issue arose. Had he received an actual opportunity for acquittal at the

first tier, he would have been found not guilty following the Commonwealth's failure of proof.

Affirming the judgment below poses no significant burden on the state or federal judiciary. Since April, 1983, Massachusetts has required an explicit waiver of double jeopardy rights by any defendant choosing to be tried under the de novo system. However, even without requiring waiver, Massachusetts and other states could easily comport with the Burks rule. A double jeopardy hearing, whether at the second tier of a state system or in federal court, would be invoked only by the small proportion of criminal defendants challenging evidentiary sufficiency, would be quicker and simpler to resolve than many pre-trial motions, and would conserve judicial resources otherwise expended in improper and unnecessary jury trials.

Affirmance of the judgment below will have a salutary effect on those two tiered systems which do not require a double jeopardy waiver. This Court has long noted that the Double Jeopardy Clause plays an essential role in preventing irrational or bad faith judicial rulings designed to afford the prosecution a better opportunity to convict at a second trial. It is therefore to be expected that first tier courts operating without this safeguard would produce an inordinate number of convictions unsupported by sufficient evidence, leaving the prosecutor to try again on a better day. Numerous studies in Massachusetts and elsewhere have indeed found that first tier courts often invert the burden of proof and have identified lack of any review as a major cause of this problem. The existence of a limited double jeopardy inquiry,

whether by the state or federal judiciary, will encourage first tier judges to apply the constitutionally required burden of proof, as well as protect the defendant's constitutional right not to be twice placed in jeopardy.

I. THE DOUBLE JEOPARDY CLAUSE PROHIBITS RESPONDENT'S RETRIAL

A. When the Prosecution Has Been Unable to Prove its Case at a Full Hearing, the Double Jeopardy Clause Does Not Permit the Prosecution a Second Opportunity.

Respondent Lydon was tried and convicted in the Boston Municipal Court on a charge of possession of burglarious implements. The United States District Court found that the prosecution had failed to prove Mr. Lydon's guilt.[2] The petitioners do not dispute that Mr. Lydon

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[2] Lydon v. Justices of the Boston Municipal Court, 536 F. Supp. 647, 652 (D. Mass. 1982).

should have been acquitted at the bench trial, but seek to reverse the judgment of the Court of Appeals so that the Commonwealth may have a second chance to marshal sufficient evidence to convict, despite the clear command of Burks v. United States, 437 U.S. 1, 11 (1978) that:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials.

In his dissent in the Court below, Judge Campbell viewed retrying Lydon as perhaps logically barred by the language of Burks,[3] but saw "little ground for serious concern that the policy underlying the Double Jeopardy Clause is being

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[3] Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1, 11 (1st Cir. 1982) (Campbell, J., dissenting).

offended."[4] It is therefore worthwhile to examine briefly that policy as enunciated by Supreme Court decisions. In the view of amici, these decisions create a consistent, sensible standard which protects both the state's interests and the defendant's interests by permitting the prosecution no more and no less than one full opportunity to prove its case.

The Supreme Court has consistently held that where the prosecution has had a fair opportunity to prove its case but has failed to do so, the Double Jeopardy Clause forbids the prosecution a second chance. This principle has been vindicated in a variety of contexts. In Downum v. United States, 372 U.S. 734, 736 (1963), the trial judge had dismissed the jury because a prosecution witness

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[4] Id. at 11.

was not present. The Supreme Court barred retrial since the mistrial was declared to afford the prosecution a more favorable opportunity to convict. Accord, Gori v. United States, 367 U.S. 364, 369 (1961) (dictum); United States v. Jorn, 400 U.S. 470, 485 (1971) (dictum). See also Swisher v. Brady, 438 U.S. 204, 215-216 (1978) and United States v. Wilson, 420 U.S. 332, 352 (1975) (approving certain appellate procedures only after insuring that they did "not provide the prosecution that forbidden 'second crack'.") The same reasoning precludes review of a jury verdict of acquittal, "the most fundamental rule in the history of double jeopardy jurisprudence". Sanabria v. United States, 437 U.S. 54, 64 (1978), quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). Even in a death penalty sentencing case, this Court found

that "having received 'one fair opportunity to offer whatever proof it could assemble,' . . . the State is not entitled to another" under the Double Jeopardy Clause. Bullington v. Missouri, 451 U.S. 430, 446 (1981).

In Burks, applying this principle in circumstances directly applicable here, this Court unanimously held that appellate reversal on grounds of insufficient evidence precludes a retrial. Although an appellate court rather than jury verdict had established that the evidence was insufficient, in either case retrial would allow the government an unconstitutional second chance to prove a case it failed to make the first time.[5]

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[5] Burks, 437 U.S. at 15-16. In Hudson v. Louisiana, 450 U.S. 40 (1981), this Court refused to restrict Burks to cases of appellate reversal, holding that a trial judge's granting of a new trial on grounds of evidentiary insufficiency precluded a second trial.

The petitioners' position that double jeopardy protection depends on the nature of the reviewing court would render both the language and rationale of these cases essentially meaningless by creating "a purely arbitrary distinction between those [convicted despite insufficient evidence of guilt] and others who would enjoy the benefit of a correct decision by the District Court."[6]

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[6] Burks, 437 U.S. at 11. Had the first tier judge dismissed the case against Lydon on grounds of insufficient evidence, as the Commonwealth concedes he should have, reprosecution would have been prohibited by the Double Jeopardy Clause. Costarelli v. Commonwealth, 374 Mass. 677, 682-683 (1978). Here, as in Burks, the protection of the Double Jeopardy Clause should not be lost simply by virtue of an incorrect ruling by the trial judge.

Although the Commonwealth seeks to limit application of Burks by arguing that the United States District Court's finding of insufficiency cannot sustain a double jeopardy claim, Commonwealth's Brief at 59-61, there is no valid reason why the identity of the court making the insufficiency finding -- trial, appellate, or federal court -- should

If retried, Michael Lydon would suffer all the ills that the Double Jeopardy Clause was intended to prevent. First, as expressed in Green v. United States, 355 U.S. 184, 187-188 (1957), allowing the state with all its resources and power to make a second attempt to meet its burden enhances "the possibility that even though innocent he may be found guilty." Retrial will permit the prosecution to shore up its weaknesses as revealed at the first trial. This Court has also noted that the opportunity to change prosecution testimony at a second trial threatens conviction of an innocent

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matter. See, e.g., Burks; Delk v. Atkinson, 498 F. Supp. 1282, 1285 (M.D. Tenn. 10th Cir. 1980), rev'd. on other grounds 665 F.2d 90 (6th Cir. 1981). See also United States v. Wilkinson, 601 F.2d 791 (5th Cir. 1979) and United States v. Bodey, 607 F.2d 265 (9th Cir. 1979).

defendant.[7] Moreover, regardless of whether additional evidence is submitted at the second trial, the expense and personal strain involved in contesting a second prosecution increases the risk of wrongful conviction by simply "wearing down" an innocent defendant. United States v. Scott, 437 U.S. at 91; Tibbs v. Florida, 457 U.S. 31 (1982); Bullington v. Missouri, 451 U.S. 430, 446 (1981).[8]

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[7] Arizona v. Washington, 434 U.S. 497, 504 n.14 (1978) quoting Carsey v. United States, 129 U.S. App. D.C. 205, 208-209, 392 F.2d 810, 813-814 (1967). United States v. Scott, 437 U.S. 82, 105 n.4 (1978) (Brennan, J., dissenting), ("not uncommon" that the government, like any litigant, will take advantage of this opportunity to alter testimony at second trials.)

[8] It is no answer to say that "while the de novo trial allows the prosecution to put in a different and perhaps stronger case, the same is of course true for the defendant," Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1, 12 (1982) (Campbell, J., dissenting), since the Double Jeopardy Clause prohibits repeated prosecutions without reference to other procedural rights conferred on

Second, retrial would impose on Mr. Lydon the physical burdens, continuing anxiety, public embarrassment and expense inherent in multiple trials, which are interests clearly protected by the Double Jeopardy Clause. Abney v. United States, 431 U.S. 651, 661 (1977); Breed v. Jones, 421 U.S. 519, 529-30 (1975); Green v. United States, 355 U.S. 184, 187-188 (1957).[9]

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the defendant. The Double Jeopardy Clause does not merely confer symetrical rights on both parties, but protects one party -- the defendant -- against a specifically delineated state encroachhment. United States v. Wilson, 420 U.S. 332, 352 (1975).

[9]As a Massachusetts judicial commission reported in 1976, a defendant required to vindicate his rights in a second trial suffers "unfair burdens": "The defendant obtains his second trial only by submitting twice to the strenuous preparation involved in defending a lawsuit: securing witnesses, consultations with an attorney, development of trial tactics and ultimately a potentially lengthy trial. . . Defendants with low incomes who do not qualify for court appointed counsel may well find the extra cost of

The Double Jeopardy Clause permits retrial only to assume the prosecution one full and fair opportunity to prove its case.[10] Where that opportunity has been frustrated by trial error,[11] a genuinely deadlocked jury,[12] or circumstances creating a manifest necessity for mistrial,[13] the Supreme Court has

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two trials prohibitive." Report of the Special Committee on Trial de Novo to the Chief Justice of the District Courts, January 1976, at 16.

See also Feely, The Process Is the Punishment: Handling Cases in Lower Criminal Court, 199-200 (1980).

[10] United States v. Scott, 437 U.S. 82, 100 (1978); Arizona v. Washington, 434 U.S. 497, 505 (1978); Burks v. United States, 437 U.S. 1, 15 (1978).

[11] United States v. Ball, 163 U.S. 662 (1896).

[12] United States v. Perez, 9 Wheat. 579 (1824); Arizona v. Washington, 434 U.S. 497, 509 (1978) (dictum).

[13] Arizona v. Washington, 434 U.S. 497 (1978) (defendant's prejudicial statement created manifest necessity for mistrial); Illinois v. Somerville, 410 U.S. 458 (1973) (defective indictment created

permitted the defendant to be retried so that "the public's interest in fair trials designed to end in just judgments" may be preserved.[14] But in Lydon, society's interest in a fair resolution of culpability has been fully served. As in Burks, "the prosecution cannot complain of prejudice, for it has been given

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manifest necessity for mistrial); United States v. Jorn, 400 U.S. 470 (1971) (judge's belief witnesses should be warned of possible incrimination created no manifest necessity; retrial barred); Wade v. Hunter, 336 U.S. 684 (1949).

[14] Arizona v. Washington, 434 U.S. 497, 516, (1978) quoting Wade v. Hunter, 336 U.S. 684, 689 (1949). In Arizona v. Washington 434 U.S. at 505, the Court noted that "retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused." In United States v. Scott, 437 U.S. 82, 98 n.11 (1978), the Supreme Court expressed its readiness to distinguish "between those rulings which relate to 'the ultimate question of guilt or innocence' and those which serve other purposes." The United States District Court's finding of insufficiency is in the former category, barring retrial.

one fair opportunity to offer whatever proof it could assemble."[15] The alleged inconvenience to the Commonwealth's two tier system cannot justify jetisoning these core purposes of the Double Jeopardy Clause.

B. Mr Lydon Did Not Lose His Constitutional Protection Against Double Jeopardy By Choosing to Participate in the De Novo System.

Mr. Lydon's position should be impossible under our constitutional system: convicted without proof, sentenced to a two-year commitment, facing a second prosecution and all the ills the Double Jeopardy Clause was intended to prevent. Nevertheless, ignoring the well-settled precedent detailed above, the Commonwealth argues that "this is not a situation which the Double Jeopardy Clause is

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[15] Burks at 16.

designed to protect against,"[16] since the respondent sacrificed any protection under that Clause when he chose the benefits that the de novo system confers:

> As the dissenting opinion [in the First Circuit] recognizes, in foregoing a right to appeal at the first tier, "convicted defendants gain the right not to be convicted finally unless the prosecution twice proves their guilt beyond a reasonable doubt."[17]

The Commonwealth cannot and does not argue that Mr. Lydon made a "knowing and voluntary waiver" of his double jeopardy rights,[18] since none appears in the

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[16] Petitioner's Brief at 64.

[17] Id. at 66.

[18] Waiver of double jeopardy rights must be knowing and voluntary. Green v. United States, 355 U.S. 184, 191 (1957). This is an application of the standard for waiver of a constitutional right set out in Johnson v. Zerbst, 304 U.S. 458 (1938).

The United States District Court in the case at bar found that "there is no evidence that Lydon had a 'meaningful choice' and made a 'voluntary knowing relinquishment of a right.'" Lydon v. Justices, 536 F. Supp. 647, 651 (1982).

record. Rather, it seems to argue that the system is so fair to the defendant that there is no government oppression of the kind the Double Jeopardy Clause was intended to prevent, and therefore no violation.

Even if the respondent had indeed received two opportunities for acquittal, double jeopardy protection does not evaporate when a defendant is granted unrelated statutory rights. "Where the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced."[19] In any case,

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[19] Burks v. United States, 437 U.S. 1, 11 n. 6 (1978). In Burks, it was no answer to the defendant's double jeopardy claim that by offering appellate review, which need not be provided under Griffin v. Illinois, 351 U.S. 12 (1956), the defendant could fairly be deprived of his double jeopardy protection.

Likewise, in Breed v. Jones, 421 U.S. 519 (1975), the benefits conferred on the defendant choosing to be tried as a juvenile did not justify an imposed waiver of his double jeopardy rights.

however, to justify "forfeiture" or "waiver" on this benefit ignores the obvious fact that Mr. Lydon never received "two opportunities for acquittal", since when the evidence was insufficient at the first tier he was convicted, not acquitted. Although the Commonwealth correctly quotes Ludwig v. Massachusetts, 427 U.S. 618, 632 (1976) as holding that "nothing in the Double Jeopardy Clause prohibits a state from affording the defendant two opportunities to avoid conviction and secure an acquittal," that case is completely inapposite where it is the government, not the defendant, that would get the "second bite at the apple."

The Commonwealth would justify an imposed forfeiture of Mr. Lydon's double jeopardy protection because some other defendants have benefited from the de novo system. But it is only because Mr.

Lydon never obtained the de novo system's theoretical benefit that the double jeopardy claim arose. It is important to remember that whenever a first tier defendant's double jeopardy interest is at stake, it is because the de novo system failed to protect that defendant's basic right to be convicted only on sufficient evidence.

II. THE DOUBLE JEOPARDY CLAUSE IS IMPORTANT TO THE FAIR OPERATION OF THE DE NOVO SYSTEM.

The protection against double jeopardy attaches to all trials and even, in some instances, to sentencing procedures that "resemble a trial".[20] There can be no question that first tier trials conducted in a de novo system are subject to the requirements of the Double Jeopardy Clause, as this court made clear

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[20] Bullington v. Missouri 451 U.S. 430, 444 (1981).

in Ludwig v. Massachusetts, 427 U.S. 618 (1976).[21]

There is good reason to believe, however, that double jeopardy protection is especially important in the de novo system. The studies detailed below have shown that more than any other judicial forum, first tier trials are too often hasty affairs with unreliable fact-finding and an inverted burden of proof. These studies have consistently identified lack of review as a major factor responsible for the lower quality of

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[21] In Ludwig, which did not involve a bench trial conviction based upon insufficient evidence, this court held:

> A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial.

Ludwig, 427 at 631-632.

justice in first tier courts. Affirming the judgment below will have a significant salutary impact on the quality of justice in those states which choose to provide a double jeopardy determination to defendants convicted in the first tier.[22]

A. Convictions on Insufficient Evidence Are a Recurrent Problem in District Court Bench Trials.

The Massachusetts district courts have jurisdiction to try all misdemeanors, and all felonies punishable by not more than five years in the state prison.[23] In terms of sheer numbers of criminal cases tried, the district courts

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[22]Some states may instead choose to require waiver of double jeopardy rights by a defendant electing to be tried by a de novo system. In such states, affirmance of the judgment below will neither burden nor benefit the operation of the two tier system in any way.

[23]Mass. Gen. Laws c. 218, §26.

are the most important trial courts in the Commonwealth.[24]

Several studies have examined the Massachusetts district courts and the de novo system. Perhaps the most comprehensive study was The Quality of Justice in the Law Criminal Courts of Metropolitan Boston by Stephen Bing and S. Stephen Rosenfeld, published in 1970.[25]

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[24]The de novo system serves several important functions. It can provide speedier and less costly adjudications than other trial systems. Colten v. Kentucky, 407 U.S. 104, 114 (1972). When working properly, it serves an essential screening function, keeping unmeritorious prosecutions out of the jury session and discouraging frivolous defense appeals to the jury session. For the rare defendant who appeals to the second tier, it provides discovery at the first tier. Ludwig v. Massachusetts, 427 U.S. 618, 627 (1976). Finally, in theory the de novo system provides a second opportunity for acquittal on the facts.

[25]This report was written under the auspices of the Lawyer's Committee for Civil Rights Under Law and the Governor's Committee on Law Enforcement and the Administration of Justice. Its findings were based on the study of 1,428

In 1975, the Chief Justice of the Massachusetts District Courts appointed six judges to a "Special Committee on Trial De Novo", which issued its report in January, 1976.[26] A third report was published in 1976 by the Governor's Select Committee on Judicial Needs, chaired by Archibald Cox and better known as the Cox Commission.[27] Additionally, many commentators have written analyses

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defendants charged with 2,192 crimes. Bing & Rosenfeld at viii.

[26]This Committee examined the effect of the de novo system on the quality of justice in the district courts. It based its findings on the experience of the member judges, the annual statistics of the district and superior courts, and the results of two surveys. Report of the Special Committee at 2-3.

[27]Report on the State of the Massachusetts Courts, by the Governor's Select Committee on Judicial Needs (1976). The Cox Commission's report was a comprehensive study of the workings of the Massachusetts trial courts. Many of its recommendations were approved in 1978 when the Massachusetts court system was reorganized.

of the Massachusetts District Court system.[28] Although the de novo system system was made optional in 1978,[29] these studies still describe the dispensation of justice in the vast majority of cases which continue to be conducted under the two-tiered de novo system.[30]

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[28] E.g. Henry Lummus, Justice of the Supreme Judicial Court, The District Courts of Massachusetts, 7 Mass. L.Q. 27 (1922); G. Joseph Tauro, The State of the Judiciary -- Annual Report of the Chief Justice of the Massachusetts Supreme Judicial Court, 60 Mass. L.Q. 241, 261 (1975); J. Robertson & O. Walker, Trial De Novo in the Superior Court: Should it be Abolished -- Two Views, 56 Mass. L.Q. 347 (1971).

[29] Perhaps partly because of the findings published in these studies, Massachusetts in 1978 passed the Court Reorganization Act, St. 1978, c. 478. This legislation (1) allows a defendant to choose between an immediate jury trial or a bench trial with appeal de novo, and (2) provides that the de novo trial be held before a six-person district court jury rather than a twelve-person superior court jury.

[30] It should be noted that long before this court decided Argersinger v. Hamlin, 407 U.S. 25, Massachusetts was appointing counsel for indigents in all jailable

Although the above studies and articles, representing the views of Supreme Judicial Court Justices, District Court Judges, practicing attorneys, and law professors, differ as to the wisdom of retaining the de novo system, there is wide agreement that the first tier bench trial is its weak link. Bing and Rosenfeld,[31] Robertson,[32] and the District Court Judges[33] all indicate that the Lydon situation -- conviction on insufficient evidence -- is a common problem. From their study of 1,400 cases, Bing and Rosenfeld identified the standard of proof generally demanded by

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offenses under Mass. Supreme Judicial Court Rule 3:10. See MacDonnel v. Commonwealth, 353 Mass. 277 (1967). This important reform was in effect at the time of the three studies cited above.

[31] Bing & Rosenfeld at 106.

[32] Robertson, 56 Mass. L.Q. at 351.

[33] Report of the Special Committee at 14.

district court judges as a preponderance of the evidence, not proof beyond reasonable doubt,[34] and quote one judge they observed as declaring, "I don't know who to believe. Just to be safe I'll find you guilty."[35] They found that certain of the Boston area courts "seriously abuse principles of fairness and due process," adjudicating cases on "considerations unrelated to guilt or innocence."[36] For example, a poor defendant was substantially more likely to be convicted whether or not he was represented by appointed counsel.[37]

Several factors combine to distort the fact-finding process and eliminate the prosecutor's burden of proof. Most

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[34] Bing & Rosenfeld at 82-83.

[35] Id. at 83.

[36] Id. at viii.

[37] Id. at 32-34, 126-127.

often identified is the lack of any review on the record.[38] Since bench trial transcripts are not scrutinized for error, first tier judges receive no guidance from appellate courts. Each judge, appointed to serve until his seventieth birthday by the Governor's Council,[39] is the unchecked arbiter of the law in his own court.[40] The District Judges found that appeal de novo had a "negative impact on the quality of justice in the District Courts," by discouraging adherence to rules of practice

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[38] Id. at 2, 26; Report of the Special Committee at 17-19; Robertson, 56 Mass. L.Q. at 352-353; Cox Commission at 31; Lumus, The Failure of the Appeal System (Mass. Prison Ass'n 1909) at 29; W. Bolster (Chief Justice, Boston Municipal Court), Criminal Appeals, 7 Mass. L. Q. 16, 25 (1922).

[39] Mass. Const. Pt. 2, Ch. 3, Art. 1.

[40] Bing & Rosenfeld at 26.

procedure.[41]

> Without appellate review, the District Courts are deprived of a corrective technique normally present in the judicial process ... The cycle is a vicious one. If the courts are not held accountable for error through direct review, occasionally they will act in a way not deserving of respect.[42]

Thus it has been reported that some district court judges openly proclaim that Supreme Court decisions are irrelevant in their court.[43]

A second factor diluting the burden of proof in the first tier is noted by the District Court Judges: the continuing working relationship between a

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[41] Report of the Special Committee at 17, 18.

[42] Id. at 18, 19.

[43] Bing & Rosenfeld at 81; R. Harris, In Criminal Court, 49 The New Yorker 45, 72 (April 14, 1973). A third Boston area judge is quoted as threatening a defense attorney with contempt of court if he mentioned the Supreme Court once more. Id. at 88.

community judge and police officers.

> Judges may tend to be case-hardened or prosecution-minded after sitting on criminal cases in a particular community for a substantial period of time. In many District Courts, the judges soon know the police by name; they see the same faces everyday and there is strong pressure to begin to think of themselves as members of the "Commonwealth's team."[44]

Additionally, the large volume of cases processed by the district court places a premium on moving cases and clearing the calendar, often requiring the most cursory consideration of individual cases. As this Court noted in Argersinger v. Hamlin, 407 U.S. 25, 34-36 (1972):

> In addition, the volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of fairness of the result...
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> That picture is seen in almost every report. "The misdemeanor

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[44] Report of the Special Committee at 14.

> trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush." Hellerstein, The Importance of the Misdemeanor Case on Trial and Appeal, 28 The Legal Aid Briefcase 151, 152 (1970).

Other investigators have underscored the damage done by such "assembly line justice" to both the fact-finding process and the defendant's constitutional rights.[45] This conditions infects

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[45] E.g. Smith & Ehrman, The Criminal Courts in CRIMINAL JUSTICE IN CLEVELAND 282 (R. Pound and F. Frankfurter, ed. 1922) found that the speedy processing of criminal cases "results practically in depriving of his day in court the poor or ignorant petty offender". The system "affords opportunities either to escape the law by 'putting it over' the judge or hastily to punish the innocent.'" Another reporter in the same study found a normal rate in the Cleveland Municipal Court of about 2½ minutes per case. Bettman and Burns, Prosecution, in CRIMINAL JUSTICE IN CLEVELAND at 114.

Professor Samuel Dash reported in 1951 that the average time spent on a case in the Chicago Municipal Court was less than 2 minutes per case, with the result that crucial facts were often omitted or unheard by the trial judge. Dash, Cracks in the Foundation of

justice in the Massachusetts district courts. Journalist Richard Harris reported that on the day he observed the Boston Municipal Court, a single judge disposed of 24 cases in 2 hours and 15 minutes, or 6 minutes per case.[46]

Criminal Justice 46 Ill. L. Rev. 385 (1951).

The President's Commission on Law Enforcement and Administration of Justice found in 1967 that the volume of cases was a major problem of the lower courts:

> An observer in the lower criminal courts ordinarily sees a trial bearing little resemblence to those carried out under traditional notions of due process ... Speed is the watchword. Trials in misdemeanor cases may be over in a matter of 5, 10 or 15 minutes; they rarely last an hour even in relatively complicated cases. Traditional safeguards honored in felony cases loose their meaning in such proceedings; yet there is still the possibility of lengthy imprisonment or heavy fine.

President's Commission, Task Force Report: The Courts, 30 (1967).

[46]Harris, supra, at 69.

Bing and Rosenfeld reported that district court judges often viewed careful and zealous preparation by defense counsel as obstructing the the court.[47] Consequently, defense lawyers were reluctant to cross-examine vigorously, argue in summation, or develop legal defenses.[48] Of 2,000 cases studied, only ten motions were noted.[49] Legal arguments often pitted judge and defense counsel as adversaries.[50] Harris reported that one Boston Municipal Court Judge

> managed to get rid of all the lawyers from the Massachusetts Defenders Committee . . . by simply refusing to grant any of their motions. . . [R]ather than participate in the legal charade that was demanded of

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[47] Bing & Rosenfeld at 109.

[48] Id., 78, 80.

[49] Id. at 79.

[50] Id. at 80.

> them, the lawyers withdrew from the court altogether.[51]

The result of all this is a seriously distorted fact-finding process. Since there is little time and sometimes little inclination to develop evidence on either side, adjudication is often not based on whether the prosecution has met its burden of proof.

> Fact-finding ... turn[s] on rough rules of thumb, rather than on an orderly exploration of the individual case. . . Trials occur swiftly, often with the presumption of innocence and the burden of proof inverted.[52]

Several other factors often dilute the presumption of innocence and burden of proof. A first tier judge may feel that an erroneous conviction is relatively unimportant since the defendant can nullify it by appeal de novo.[53]

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[51] Harris at 46.

[52] Robertson, Rough Justice, xix.

[53] Bing & Rosenfeld at 84; Report of

While capable personnel can be found throughout the judicial system, the judges, district attorneys, and defense lawyers manning the first tier courts will sometimes be less experienced or less confident than the personnel found in superior court.[54] Finally, the district courts' failure to safeguard the presumption of innocence can create a vicious circle. Although the petitioners

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the Special Committee at 18.

As early as 1922, Supreme Judicial Court Justice Henry Lummus criticized the de novo appeal as stripping the first tier judge of power and responsibility, which he believed discouraged "caution, judgment, sanity and efficiency". Lummus, The District Courts of Massachusetts, 7 Mass. L.Q. 27, 28.

The Cox Commission (at 31) found that the ever present possibility of trial de novo in superior court "might unconsciously impair the performance of district judges". The U.S. National Advisory Commission on Criminal Justice Standards and Goals quoted studies suggesting that appeal de novo "reduces lower court incentive to improve." Courts 166 (1973).

[54] President's Commission at 32.

and the dissenter in the Court below both state that prosecutors have every incentive to submit their best case at the first proceeding,[55] that incentive is surely diminished when district attorneys, faced with their own large caseloads, can rely on the laxness of the first tier court rather than full preparation and proof.[56]

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[55] Petitioner's Brief at 66; Lydon v. Justices of the Boston Municipal Court, 698 F.2d 1, 12 (1st Cir. 1982) (Cambpell, J., dissenting).

[56] In Argersinger v. Hamlin, 407 U.S. 25, 35 (1972) this Court, quoting the President's Commission on Law Enforcement, noted that prosecutors often "walk into courtrooms to try simple cases as they take their initial looks at files." The Court cited another report finding "irresponsible preparation" on the part of the prosecution and defense. Id. Thus, little had changed in the sixty years since the Cleveland study reported that the prosecution was generally unprepared at trial, conducted no investigation, and merely presented what evidence the police had given them. Bettman and Burns, Prosecution, in CRIMINAL JUSTICE IN CLEVELAND 169 (Pound and Frankfurter, eds. 1922). See also, U.S. Nat'l. Advisory Commission on Criminal Justice Standards and Goals,

The problems of the first tier courts are compounded by their invisibility. These courts, immune from correction by an appellate court, also are not generally subject to rigorous public or governmental scrutiny. The virtually unanimous findings of the Massachusetts studies might surprise many who do not appear regularly in first tier courts, for reasons expressed a half a century ago by Roscoe Pound:

> The legal profession as a whole has little interest in petty prosecution, and when the facts are stated publicly, some of the best, most public spirited, and most respected members of the bar are not unlikely to assume that such things cannot be true and to denounce those who reveal them as agitators or ruckmakers.[57]

Courts 8, Washington, D.C. (1973) (problems of inadequate prosecutorial performance "especially acute in lower courts.)

[57] Pound, Criminal Justice in the American City, in CRIMINAL JUSTICE IN CLEVELAND,

The Massachusetts reports mirror the findings of numerous studies of the country's lower criminal courts. Almost every investigator of whatever era[58] -- judicial commission,[59] legal scholar,[60]

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609 (R. Pound and F. Frankfurter, eds. 1922).

[58] At a symposium on the lower courts in 1969, Dean Francis Allen reported that a survey of studies showed conditions in the lower courts essentially unchanged from the 1930's. "[L]ittle if any, improvement has occurred in many communities . . . [there is still] the same failure of justice and efficiency that had evoked disquiet in the early 1930's." Allen, Small Crimes and Large Problems: Some Constitutional Dimensions, in Mass Production Justice and the Constitutional Ideal (1970) (C. Whitebread, ed.).

[59] S. Seabury, In the Matter of the Investigation of the Magistrate's Courts in the First Judicial Department and the Magistrates thereof and of Attorneys-at-Law Practicing in Said Courts, [New York] Supreme Court, Appellate Division, First Judicial Department. Final Report (March 28, 1932).

[60] See, e.g., the symposium on lower criminal courts reported in Mass Production Justice and the Constitutional Ideal (C. Whitebread ed.

task force,[61] -- has agreed with the Wickersham Commission that these courts are "the least satisfactory part of our judiciary system".[62] Thirty-five years after the Wickersham Commission's report, the President's Commission on Law Enforcement and Administration of Justice

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1970); Criminal Justice in Cleveland (R. Pound and F. Frankfurter, eds. 1922); J. Robertson, Rough Justice: Perspectives on Lower Criminal Courts (1974) (introduction); S. Dash Cracks in the Foundation of Criminal Justice, 46 Ill. L. Rev. 385 (1951); R. Nutter, The Quality of Justice in Misdemeanor Arraignment Courts, 53 J. Crim. L. Crim. and P.S. 215-219 (1962).

[61] American Bar Association, Commission on Standards of Judicial Administration, Standards Relating to Court Organization, Chicago (1974); President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, Washington D.C. (1967); U.S. Nat'l Advisory Commission on Criminal Justice Standards and Goals, Courts, Washington, D.C. (1973); Wickersham Commission (National Commission on Law Observance and Enforcement): Report on Criminal Procedure (1931).

[62] Wickersham Commission Report, Report on Criminal Procedure, 11 (1931).

wrote in a strikingly similar report:

> No findings of this Commission are more disquieting than those relating to the condition of the lower criminal courts. . . The many persons who encounter these courts each year can hardly fail to interpret that experience as an expression of indifference ... to the ideals of fairness, equality and rehabilitation... Every day in the court houses of metropolitan areas the inadequacies of lower criminal courts may be observed.[63]

This report and others found that misdemeanor courts give inadequate attention to constitutional requirements[64] and produce inaccurate fact-

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[63] President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, 29-30 (1967).

[64] Id. at 31, quoted in Argersinger v. Hamlin, 407 U.S. 25, 35 (1972). Another commentator described the lower criminal courts as "characterized by a marked departure from the world of due process." A. Enker, Lower Courts in Whitebread at 186.

See also Robertson Rough Justice at xix.

finding,[65] both, of course, resulting in convictions of the innocent. In the past ten years, three national commissions have recommended the abolition of the state inferior courts.[66]

In sum, diverse studies indicate that a defendant in the first tier courts runs a significant risk of conviction even when the government fails to meet its burden. The problem is compounded by the fact that over 98% of

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[65] President's Commission, Task Force Report: The Courts, 31 (1967); SMith & Ehrman, The Criminal Courts, in CRIMINAL JUSTICE IN CLEVELAND 254-275 (R. Pound & F. Frankfurter eds. 1922); Robertson, Rough Justice at xix.

[66] American Bar Association, Commission on Standards of Judicial Administration, Standards Relating to Court Organization, Chicago (1974); President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, 33, Washington D.C. (1967); U.S. Nat'l Advisory Commission on Criminal Justice Standards and Goals, Courts, 166, Washington, D.C. (1973) (recommending abolition of lower courts subject to de novo review).

defendants do avail themselves of a de novo trial,[67] often to avoid the strain and expense of a second trial.[68] Those incorrectly convicted who do appeal are

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[67]The Cox Commission reported that in 1974, 9% of complaints brought in the Massachusetts District Courts were appealed, and less than 1% were actually tried before a jury in the second tier court. Report on the State of the Massachusetts Courts at 31. In Rhode Island's two tier system, less than two percent of the cases were ultimately carried to the second tier. Id. at 33. Another investigation reported less than 0.5% of Mass. district court cases were tried de novo in 1969. Robertson and Walker, 56 Mass. L. Q. 347, 367, n.5.

[68]Report of the Special Committee at 15.

Also see Robertson, Trial De Novo in the Superior Court -- Should it be Abolished -- Two Views at 350. Robertson says that innocent defendants may not appeal because of such factors as the prospects of long waits, repeated court appearances, loss of work time, witness unavailability, further attorneys' fees, renewed bail, and the prospect of an increased sentence on appeal.

Bing and Rosenfeld disputed that the de novo system "overprotects" this vast majority of defendants:

> Our assessment, built upon our statistical study, leads us

still forced to submit to a second trial at which the prosecution will have a second, probably better chance to make a case.

A Supreme Court holding that the Double Jeopardy Clause requires a limited scrutiny of first tier trials for evidentiary sufficiency will predictably reduce the likelihood of such irrational and arbitrary judicial rulings. This Court has often noted that the "manifest necessity" standard guards against "bad-faith conduct by a judge [who declares a mistrial] . . . so as to afford the prosecution a more favorable opportunity to convict the defendant" at a second trial. Arizona v. Washington,

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> to conclude ... that the trial de novo process presents a substantial danger of injustice to defendants who do not receive this second trial.

At 4.

434 U.S. 497, 508 (1978), quoting United States v. Dinitz, 424 U.S. 600, 611 (1976).[69] It guards equally against simply incorrect rulings causing the same result. Arizona v. Washington at 504, quoting United States v. Jorn, 400 U.S. 470, 483 (1971). In Downum v. United States, 372 U.S. 734, 738 (1963), this Court noted that the Double Jeopardy

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[69]Many other cases have cited the danger of bad faith judicial rulings. In Green v. United States, 355 U.S. 184, 188 (1957) the Court explained that jeopardy must attach when the jury is sworn so as to prevent "a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing trial when it appears that the jury might not convict." The court has required a "manifest necessity" for mistrial, in part to prevent a trial judge from declaring a mistrial "to afford the prosecution a more favorable opportunity to convict. . ." Gori v. United States, 367 U.S. at 369; Downum v. United States, 372 U.S. at 736 (1963). Even where the defendant moved for mistrial, reprosecution might be barred when the motion was necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal. United States v. Jorn, 400 U.S. 470, 485 n. 12 (1971).

Clause protects the liberty of the citizen by preventing "unlimited, uncertain and arbitrary judicial discretion."

There is no reason why this important safeguard, deemed essential by the Supreme Court in every other forum, is less necessary in the de novo system. Bing & Rosenfeld found that all participants "come to recognize that the judge's personal power and personal prejudices overshadow established rules of law in the district courts."[70] The Lydon case, like the Massachusetts studies, demonstrates that the defendant in a first tier Massachusetts trial is as likely to be damaged by an irrational or even bad-faith ruling affording the prosecution a "second chance" as defendant Downum was, although the

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[70]Bing & Rosenfeld at 80.

mechanism would be a stigmatizing conviction rather than an unnecessary mistrial. Justice Stewart, dissenting in United States v. Jorn, 400 U.S. at at 489, stated that "there is no question" that the guarantee against double jeopardy would make another trial impermissible when the judge exercises his authority to help the prosecution obtain a second opportunity to convict. The Commonwealth, however, would leave the defendant stranded, placing the risk of judicial arbitrariness on the defendant, not the government.

III. THE BURKS RULE WOULD NOT SIGNIFICANTLY BURDEN THE DE NOVO SYSTEM.

The Commonwealth argues that affirming the judgment below will disrupt both the federal and state systems.[71] Judge Campbell's dissent in the court below suggested that the majority opinion

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[71] Petitioner's Brief at 69.

would require a restructuring of the whole de novo system.[72] As will be demonstrated, these fears are not borne out by the experiences of the state de novo systems.

Before examining the consequences of the Burks rule on the de novo system, amici submit that these consequences can hardly justify abrogation of Mr. Lydon's Double Jeopardy protection. As Burks stated, where the Double Jeopardy Clause is applicable its sweep is absolute and there can be no "balancing of equities."[73] This court discarded a similar argument in Breed v. Jones, 421 U.S. 519, 535 n. 15 (1975), finding that the indisputable difficulties imposed on juvenile proceedings by the Double Jeopardy Clause

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[72] Lydon v. Justices, 698 F.2d 1, 12 (1982) (Campbell J., dissenting).

[73] Burks v. United States, 437 U.S. 1, 11 n. 6 (1978).

"tell . . . us no more than that the Constitution imposes burdens on the functioning of government and especially of law enforcement institutions."

The Constitution would be meaningless indeed if any state legislature could successfully defend its choice of an unconstitutional system by pointing to the burdens that would result from conforming to constitutional rights. In this sense, the Commonwealth's complaint is a thinly disguised assertion that the constitutional right against double jeopardy survives only at the sufferance of the Massachusetts legislature, as the dissenters in the Supreme Judicial Court noted.[74]

The constitutional protection against double jeopardy, then, must

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[74] Lydon v. Commonwealth, 381 Mass. 356, 369-370 (1980) (Liacos, J., concurring in part, dissenting in part).

be observed, but within these confines there is abundant room for experimentation with alternative criminal justice systems, including the de novo system. Examination of the de novo system bears out the United States District Court's view that "[o]ur holding [granting Mr. Lydon's writ] ... need not eliminate nor even work substantial change in the operation of the Massachusetts two tier system."[75]

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[75] Lydon v. Justices of the Boston Municipal Court, 536 F. Supp. 647, 652 (D. Mass. 1982). Of course, since states are not constitutionally required to provide review, Griffin v. Illinois, 351 U.S. 12, 18 (1956), a particular state might do nothing, leaving any double jeopardy issue to be resolved by the federal judiciary. However, the states will almost certainly respond in the state system to a clear double jeopardy decision, as Massachusetts has already done. In Lydon v. Commonwealth, 381 Mass. 356, 360, n.7 (1980), the Massachusetts Supreme Judicial Court established that the second tier court was the proper place to raise a double jeopardy claim. In Commonwealth v. Montanez, 388 Mass. 603, 604 (1983), the

Massachusetts appears to have chosen one option which eliminates any real inconvenience to the two tier system stemming from the Double Jeopardy Clause: waiver. In Commonwealth v. Montanez, 388 Mass. 603, 605 (1983), the Massachusetts Supreme Judicial Court ordered that any defendant choosing the two tier system be required to waive his double jeopardy right prior to the first tier trial, at the same time he waives his right to a jury in the first instance.[76] Since

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Court stated that "if it were necessary in this case to do so, we would ... assume without deciding that the Federal Lydon decision reached a correct result under Federal law... We would take this course because our decision is reviewable in habeas corpus proceedings in a United States District Court which would be bound by the Federal Lydon decision." In Montanez, the state court responded to the Lydon decision by establishing a waiver procedure, as noted following.

[76] Amici intimate no view on the constitutionality of the Commonwealth's waiver requirement, which is outside the scope of this brief.

Massachusetts has been routinely obtaining such pre-trial waivers since April 29, 1983 with no apparent difficulty, it is hard to credit the Commonwealth's argument that the Lydon decision "affects the ability of the state to experiment in the area of criminal trial procedure and to provide practical advantages to the defendant..."[77]

Massachusetts and other de novo states need not resort to waiver, however, to comport easily with the Double Jeopardy Clause. Massachusetts, for example, could provide a double jeopardy determination for evidentiary sufficiency claims in the second tier without any restructuring of its present de novo system. In Lydon, 381 Mass. 356, 367 (1980), the Supreme Judicial Court noted that the mechanism for such a

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[77] Petitioner's Brief, at 67.

review is already in place:

> We conclude that the jury trial session [the district court's second tier] is the appropriate forum for consideration of double jeopardy claim [sic] asserted after a bench trial. If there is a valid double jeopardy claim, it should be dealt with before, rather than after, the second trial. . .
>
> Rule 13(c)(2) of the Massachusetts Rules of Criminal Procedure... provides that '[a] defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.' Consequently, the defendant's motion to dismiss properly should have been considered on the merits in the jury trial session.

This second tier review could afford defendants their constitutional protection against double jeopardy in a simple, speedy and effective manner. In contrast to pre-trial motions to suppress or dismiss, which sometimes require a succession of witnesses and lengthy argument, a double jeopardy motion could be disposed of quickly. In Massachusetts, the second

tier judge would examine either a stipulation between the parties as to the content of the transcript, or a verbatim transcript of the first tier proceedings, which are now electronically recorded.[78] In Lydon, that transcript comprised only eleven pages.[79] Further, ruling on a double jeopardy motion would be relatively straight-forward. Unlike other pre-trial motions, the double jeopardy issue will never result in credibility contests or complex fact patterns; rather, the court will bar retrial if an

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[78]There may presently be some state systems which do not record first tier proceedings. Defendant's double jeopardy rights may be safeguarded in such states by any of several routes, such as: (1) a stipulation between opposing counsel as to the record; (2) a brief statement of facts written by the judge when a double jeopardy motion is filed; (3) instituting recording equipment; (4) arguably placing the burden on the defendant to insure that the proceedings are recorded.

[79]Petitioner's Brief, at 53 n. 16.

element was not supported by sufficient evidence, and "such a decision will be confined to cases where the prosecution's failure is clear."[80] The issue is easily handled in a summary procedure.[81]

In assessing the burden imposed by such a procedure, which may typically be adopted by other states to comport with the Burks requirement, it is well to point out that Massachusetts has offered similar procedural rights on the civil side for many years without difficulty. A civil litigant in district court may obtain a jury trial de novo, but he is first afforded (1) full appellate review of the first tier trial by a panel of state district court judges to consider any claims of reversible error, Mass.

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[80] Burks v. United States, 437 U.S. 1, 17 (1978).

[81] Abney v. United States, 431 U.S. 651, 662 n. 8 (1977).

G. L. c. 231, §108, and (2) another review of the transcript by the second tier judge to determine whether the appellate panel correctly ruled that there was no reversible error, for the purpose of determining the admissibility of the first tier finding at the de novo trial. Harrison v. Textron, Inc., 367 Mass. 540, 553 (1970). See Orasz v. Colonial Tavern, Inc., 365 Mass. 131 (1974).[82]

Different alternatives have been adopted by other two tier jurisdictions

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[82]A civil litigant in Superior Court, the court of general trial jurisdiction, has a right to review by a single justice of the Appeals Court on interlocutory orders. Mass. Gen. Laws c. 231, §118. Thus, Massachusetts has chosen to devote considerable judicial resources to safeguarding the right of a civil litigant to, for example, obtain the answer to a deposition question, while arguing that it would unduly burden the judiciary to protect a criminal defendant's constitutional protection against double jeopardy.

in order to comply with the Due Process Clause. In Pennsylvania, a defendant convicted at the first tier may elect whether to proceed with an appeal de novo or appeal on the record.[83] Or, as the United States District Court noted in its decision below,[84] the state could adopt Maryland's juvenile procedure, which precludes the prosecution from offering new evidence at the second level. See Swisher v. Brady, 438 U.S. 204 (1978). In sum, the multiplicity of alternatives demonstrate that the Burks rule need not place any substantial burden on the de novo system.

Petitioners also argue that

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[83] See Commonwealth v. Poindexter, 248 Pa. Super. 564, 375 A.2d 384 (1977), rev'd. on other grounds, 484 Pa. 472, 399 A.2d 390 (1979); Commonwealth v. Dincel, ___ Pa. Super. ___, 457 A.2d 1278 (1983).

[84] Lydon v. Justices of the Boston Municipal Court, 536 F. Supp. 647, 652 (1982).

affirming the judgment below will ultimately disrupt the federal system and cause "significant delay in the two tier system where those convicted in the bench trial may now avail themselves of yet a third federally created tier."[85] This Court rejected a similar argument in Abney v. United States, 431 U.S. 651, 662 n.8 (1977), which permitted an interlocutory review of a federal defendant's pretrial double jeopardy claim:

> . . .[W]e believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.

Additionally, the court below did not purport to provide every defendant with a right to interlocutory habeas

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[85]Petitioner's Brief at 69.

review of his first tier conviction, specifically limiting its holding to cases characterized by several factors present in the case at bar.[86]

As earlier noted, very few attorneys in Massachusetts first tier trials, most of whom are appointed, file any motions at all.[87] Of those defendants tried in the first tier, less than 2% availed themselves of de novo trials.[88] Less than 0.2% of defendants appeal from the second tier to the appeals court.[89]

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[86] Lydon v. Justices, 698 F.2d at 7. Those factors included the strength of the double jeopardy claim (at 6), the lack of any need for speedy trial expressed by either side, (at 5), and the unavailability of state appellate review, (at 5, 6).

[87] See supra, p. 35.

[88] See supra, p. 44, n. 67.

[89] From January 1, 1979, when final jurisdiction over a wide-range of criminal cases was conferred on the Massachusetts District Court, to March 31, 1980, only 22 appeals from the 1,465 second tier

It is therefore hardly likely that either the state or federal judiciary will be swamped with double jeopardy motions. The Petitioner's Brief can cite only four double jeopardy claims filed in federal court out of the several hundred thousand criminal cases held since the United States District Court's decision in Lydon.[90]

Finally, any consumption of judicial resources resulting from a double jeopardy review is likely to be offset in two ways. First, every double jeopardy claim which is sustained will eliminate the wasteful, far greater drain on judicial resources inherent in a jury

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cases were docketed in the Appeals Court, or 0.15%. Statistics derived from the docket books of the Appeals Court.

[90]Petitioner's Brief at 69, n.22. In 1980, 478,695 criminal complaints were disposed of by the Massachusetts district courts. 1982 Annual Report of the Massachusetts Trial Court at 28.

trial. This would help eliminate one of the burdens on judicial systems identified by the Cox Commission: lack of effective screening of unmeritorious cases before trial.[91] Second, to the degree that a double jeopardy review encourages judges generally to apply the proper burden of proof, fewer double jeopardy motions and fewer de novo trials will be necessary.

Like such earlier reforms as the Argersinger requirement and recordation of proceedings, affirmance of the judgment below will be remembered not as a burden or even an inconvenience, but as a necessary and natural step towards perfecting the quality of justice in the district courts.

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[91] Report on the State of the Massachusetts Courts at 62.

CONCLUSION

For the reasons stated above the judgment of the Court of Appeals for the First Circuit should be affirmed.

Respectfully submitted,

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No. 82-1479-CFH
Status: GRANTED

Title: Justices of Boston Municipal Court, Petitioners
v.
Michael Lydon

Docketed:
March 4, 1983

Court: United States Court of Appeals
for the First Circuit

Counsel for petitioner: Smith, Barbara A. H.

Counsel for respondent: Rossman, David

Entry	Date	Note	Proceedings and Orders
1	Mar 4 1983	G	Petition for writ of certiorari filed.
2	Apr 7 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
3	Apr 7 1983		Brief of respondent Michael Lydon in opposition filed.
4	Apr 13 1983		DISTRIBUTED. April 29, 1983
6	May 9 1983		REDISTRIBUTED. May 12, 1983
8	May 16 1983		REDISTRIBUTED. May 19, 1983
11	May 23 1983		REDISTRIBUTED. May 26, 1983
13	May 31 1983		REDISTRIBUTED. June 2, 1983
15	Jun 6 1983		REDISTRIBUTED. June 9, 1983
17	Jun 13 1983		REDISTRIBUTED. June 16, 1983
19	Jun 20 1983		REDISTRIBUTED. June 23, 1983
20	Jun 27 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
21	Jun 27 1983		Petition GRANTED.
			**********
23	Jul 14 1983		Order extending time to file brief of petitioner on the merits until September 1, 1983.
24	Sep 1 1983		Brief of petitioner Justices of Boston Mun. Ct. filed.
25	Sep 1 1983		Joint appendix filed.
26	Oct 1 1983		Record filed.
27	Oct 1 1983		Certified original record & C.A. proceedings received.
28	Oct 6 1983		Brief of respondent Michael Lydon filed.
29	Oct 7 1983		Brief amicus curiae of American Civil Liberties Union, et al. filed.
30	Oct 18 1983		CIRCULATED.
31	Oct 24 1983		SET FOR ARGUMENT. Tuesday, December 6, 1983. (2nd case) (1 hour)
32	Nov 29 1983	X	Reply brief of petitioner Justices of Boston Mun. Ct. filed.
33	Dec 6 1983		ARGUED.